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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

WILL RAY HENRY,

PETITIONER

VS.

DELHI-TAYLOR OIL CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

B. R. CHASTAIN
ATTORNEY OF RECORD
HUBERT L. STONE, JR.
CURTIS B. DYER
902 CORPUS CHRISTI STATE NATIONAL BUILDING
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6) Will Ray Henry vs. Delhi-Taylor Oil Corporation
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PETITION FOR A WRIT OF CERTIORARI
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STATE OF TEXAS

Petitioner, Will Ray Henry, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas.

OPINIONS BELOW

The judgment of the 28th District Court of Nueces County, Texas, in Cause Number 73714-A, was entered on June 26, 1964. The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas setting at Corpus Christi, Texas, in Cause No. 125, delivered and filed on May 12, 1966. (Append x A) The opinion of the Supreme Court of Texas in Cause No. A-11,582 was delivered on May 31, 1967

(Appendix A). Petitioner's Motion for Rehearing was denied on July 14, 1967 (Appendix A). The opinion of the Supreme Court is reported in 416 SW2nd 885.

JURISDICTION

The Supreme Court of Texas entered its opinion on May 31, 1967 (Appendix A) and Petitioner's Motion for Rehearing was denied on July 14, 1967 (Appendix A). The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTION PRESENTED

Whether the rendered judgment and the action of the Texas Supreme Court in failing and refusing to apply its own Rule of Civil Proceedure, have denied Petitioner his "hearing" guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B: Rule 279, Texas Rules of Civil Proceedure; Rule 503, Texas Rules of Civil Proceedure. Rule 1, Texas Rules of Civil Proceedure.

STATEMENT

Will Ray Henry, Petitioner herein, was an employee of Roy Vickers Lease Service, an independent contractor. Vickers was hired by Delhi-Taylor Oil Corporation to do extensive work

on Delhi's pipelines running through its refinery in Corpus Christi. While prosecuting the work of his employer, Henry suffered severe injuries. Henry was welding two pieces of twenty-four inch pipe that were located in a ditch. A dragline earth moving machine was being operated some twenty to thirty feet from the ditch in which Henry was working. All of such work was under the direction and control of Delhi-Taylor. The dragline bucket, being operated by another Vicker's employee, punctured one of Delhi-Taylor's pipelines, which contained toluene, a highly flammable fluid. The toluene, escaping from the punctured pipeline, spurted up, over and into the ditch in which Henry was welding. The toluene ignited from Henry's welding torch and Henry was burned over eighty-five percent of his body with first, second and third degree burns.

Henry instituted a lawsuit against Delhi-Taylor alleging that Delhi-Taylor owed him a duty to provide him a safe place to work or that Delhi-Taylor owed him a duty to warn him of dangerous conditions that were known by Delhi to exist on their premises.

Henry prevailed in the Trial Court and in the Court of Civil Appeals on the basis that Delhi-Taylor had breached its duty to provide Henry with a safe place in which to work or to warn him of the dangerous condition. This was the well settled law in the State of Texas. Notice, no issue was submitted, or requested on the question of whether Vickers, the Petitioner's

employer was warned of the dangerous condition. No objection was made to such issue not being submitted and no findings were requested at any time on this question.

Then, on application for Writ of Error, the Supreme Court changed the law and declared that a warning to the employer independent contractor discharges the duty to warn the employee of the independent contractor. Then rather than remand the case for new Trial Under the newly declared rule of law, even though the Trial Court and both parties presented the case based upon the principle, firmly established by the Supreme Court in their prior decision in the case of Galveston Houston Electric Ry. Company, Reinle, 113 Texas 456; 258 SW2nd 803, (1924), the Supreme Court rendered the Plaintiff take nothing. This rendition was squarely in the face of the fact that no evidence was submitted by the Plaintiff on the question of warning to the employer, Vickers, and no issues or findings requested on such question.

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court has deprived Petitioner of his right to a "hearing" guaranteed under the Fourteenth Amendment to the United States Constitution in two ways:

(1). By failing and refusing to apply that Court's own Rule 279, Texas Rules of Civil Proceedure and,

(2). By rendering a judgment that Petitioner take nothing rather than remanding the case for a new Trial.

The Texas Supreme Court's own Rule 279, Texas Rules of Civil Proceedure provides:

> Rule 279 provides in its applicable portion that, " . . . where a ground of recovery consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery . . . are omitted without request or objection.
>
> and no written findings are made such omitted issue or issues shall be deemed as found by the Court in such a manner as to support the judgment."

In order to reach the ultimate error that is sought to be corrected you must begin with the original cause of action, for the reason that the law which controlled the theory of your petitioner's cause of action was well settled law in the State of Texas, Reinle Case, Id.

The preparation and presentation of this cause of action were predicated upon this well established theory. The Special Issues upon which this case was submitted to the Jury in the Trial Court were formulated and based upon this well settled law. This same approach and theory was continued up to and including the Petitioner appelee's position before the State Supreme Court. Not until the Supreme Court rendered its opinion not only overruling the Reinle Case, id., but reversing and rendering the decisions of the Court of Civil Appeals and the Trial Court in the instant case. In order to accomplish this the Supreme Court, by necessity, was required to change the law that controlled the theory upon which Petitioner based his whole cause of action. Now please note the following statement carefully.

Your Petitioner does not complain to this Court that the Texas Supreme Court, in its wisdom changed the law. The error complained of is two fold:

(1). The Supreme Court ignored its own Rule 279 and did not deem as found in support of the judgment the unsubmitted issue of warning. The law preceding the Supreme Court's decision did not require that a special issue be submitted or a finding made on the question of whether a warning had been given by the owner-occupier to the employer of the injured employee of the existing dangerous conditions. Under the Reinle Case, id. decision, the Supreme Court had specifically declared that warning or knowledge given or possessed by the independent contractor employer is not sufficient to satisfy the duty owed by the owner-occupier of the premises. No issue was requested on this question, and the lack of request for this issue was never objected to and no findings were requested by the Defendants on this question. Rule 279, Texas Rules of Civil Proceedure. The record is absolutely silent with regard to the issue of warning. Therefore, under the directive provisions of Rule 279 the unsubmitted issue of warning should have been "deemed as found by the Court in such a manner as to support the judgment . . . ", and herein the Texas Supreme Court failed and refused to follow their own rules and thereby denied this petitioner a fair and meaningful "hearing". Certainly a "fair and meaningful hearing", guaranteed by the United States Constitution is not a hearing in which the rules by which a controversy

is to be resolved can be changed at the will or whim of the Court. This is exactly what has occuried here. The Texas Supreme Court changed the rules after the contest was finished and declared the winner the looser under the new rule. This surely cannot avoid violating the due process of law provisions of the Fourteenth Amendments to the United States Constitution.

(2). The second error which petitioner would urge is that he has as a practical matter and as a matter of fact been denied by the action of the Texas Supreme Court the opportunity to be heard at all. As was made clear earlier, your Petitioner fully recognizes the State Supreme Court's authority and responsibility to change the law. However, to render, rather than remand for new trial under the newly declared law is to deny this Petitioner the opportunity to be heard. Not an ounce of evidence was developed on the question of warning to the employer by the Plaintiff, Petitioner. Why? The law was clear that warning to the employer was not sufficient to satisfy the duty owed to the employee by the owner-occupier. This had been declared by the State Supreme Court itself some years before. Reinle, id. Therefore, your Petitioner has been denied due process of law by being denied the opportunity for a hearing at which he could present his evidence to satisfy this new requirement of law.

This Court has repeatedly declared as it stated in Armstrong vs. Manzo, 85 S. Ct. 1187, that, it is

> "A fundamental requirement of due process is the opportunity to be heard; it is an opportunity which must be granted at a meaningful time in a meaningful manner."

No one can seriously maintain that your Petitioner has had an opportunity for "a meaningful hearing", in time or manner since the law that controlled his total cause of action was changed after his case was tried and granted. Furthermore, in the case U. S. vs. Dillman, 146 F2nd 572, although certiorari was denied in that case, the Court stated that,

> "basic elements of full and fair hearing include the right of each party to be appraised of the evidence plus the right to examine, explain or rebut all such evidence."

In this case, Petitioner has never had the opportunity, much less a "full and fair hearing" to "examine, explain or rebut" any evidence in regard to a sufficient warning to the employer as satisfying the duty to warn the employee.

Petitioner recognizes that this Court has also declared that the Fourteenth Amendment ". . . has not the effect of imposing any form or mode of proceedure. But in that same statement in S.A.S. vs. State of Mo. 334 F2nd 506, the Court went on to say,

> " . . . so long as the essential rights of notice, hearing or opportunity to be heard . . . are not interferred with."

The Texas Supreme Court promulgated the Rules of Civil Proceedure itself. Rule 279 is one of that Court's own rules and it

specifically provides that an unsubmitted issue under the circumstances of this case shall be deemed as found in support of the judgment. If we are to assume that the objections of the rules " . . . are to obtain a just, fair, equitable and impartial adjudication of the established principles of substantive law ", as is the stated objective in Rule 1, Texas Rules of Civil Proceedure, then it must follow that to arbitrarily refuse to apply these Rules as the Court has done in this case is to interfer with due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The question presented is basic and of utmost importance to our whole system of jurisprudence. Can a man be deprived of his property simply by the Courts refusing to apply an applicable Rule and/or by changing the law and refusing him the opportunity to be heard on the changed law? The security of knowing these rights are protected and secured to every individual in this country underlies the very foundation of our entire system of law.

CONCLUSION

To declare again the rights and guaranteed secured in the Fourteenth Amendment to the United States Constitution, Petitioner respectfully prays that this writ of certiorari be granted.

Respectfully submitted,

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leasehold below 4704 feet. The first recital in the contract begins, "Whereas Midstates is the present owner of an oil and gas leasehold, insofar as said leasehold covers and applies to all horizons below a depth of 4704 feet subsurface * * *" The Court of Civil Appeals stated that this recitation created a doubt as to the intention of the parties to the 1941 contract. We disagree. The parties were dealing with gas produced below 4704 feet; and a recitation that one of the parties owned such rights is not, in context, to be taken as a declaration that such party does not own other rights.

In 1947 there was an agreement between United Gas Pipe Line Company, Midstates, and Alvord to release certain gas purchase contracts. The Court of Civil Appeals says this contract "settled the issue as to who owned the shallow mineral rights down to a depth of 4704 feet because Midstates thereby released all of its rights above 4704 feet." 408 S.W.2d at 773. We disagree. The only provisions of the 1947 contract which purport to release any rights of Midstates above 4704 feet are as follows:

> "* * * For the same consideration *Midstates does hereby release, discharge and relinquish any and all rights, if any, which it owns or might assert in said gas purchase contract* described in paragraph (b) * * * down to a depth of four thousand seven hundred four (4,704) feet * * * *together with any and all rights and options which it might have for the purchase and transfer from Alvord of any and all wells now situated on and producing from any properties covered by said gas purchase contracts* * * *."

The quoted language quite obviously does not release a *leasehold estate*; it releases only rights, if any, in a gas purchase contract under the terms of which the gas produced was sold to United Gas and an option which Midstates had under the terms of a 1941 contract to obtain certain wells from Natural [Alvord].

[3] The assignment of April 1941 which embodies the conditions and reservations of the contract to assign of March 1941 is so worded that it can be given a certain or definite legal meaning. Its terms are expressed without uncertainty. It is not ambiguous. Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154 (1951); Lewis v. East Texas Finance Co., 136 Tex. 149, 146 S.W.2d 977 (1941), and Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 136 S.W.2d 800, 127 A.L.R. 1217 (1940). The trial court therefore was correct in entering a summary judgment for Tenneco and the intervenors.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

HAMILTON, J., not sitting.



DELHI-TAYLOR OIL CORPORATION,
Petitioner,
v.
Will Ray HENRY, Respondent.
No. A-11582.

Supreme Court of Texas.
May 31, 1967.
Rehearing Denied July 14, 1967.

Action by invitee against occupier of premises for personal injuries sustained while working as a welder on premises under occupier's control. The 28th District Court, Nueces County, Horace S. Young, J., rendered judgment for invitee, which was affirmed by the Court of Civil Ap-

peals, 403 S.W.2d 885, and writ of error was granted. The Supreme Court, Calvert, C. J., held that owner or occupier of property owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden danger on the premises or to warn them thereof, and adequate warning to or full knowledge by independent contractor of the danger will discharge alternative duty of owner or occupier to warn the employees.

Judgments reversed.

1. Negligence ⇐50

An owner or occupier of land may relieve himself of liability for harm to his invitees from dangerous conditions on the premises which are not open and obvious by taking proper precautions to protect them from the danger or by warning them thereof.

2. Negligence ⇐48

Owner or occupier of land owes no duty to his invitees either to eliminate or to warn of dangerous conditions on the premises which are as well known to them as they are to him.

3. Explosives ⇐7

Warning given by occupier of land to officer of independent contractor and his foreman that buried lines on the property should be treated as though they were loaded, when considered with knowledge of officer and his foreman of the condition of the premises and the dangers inherent therein, was adequate to discharge occupier's duty to officer and his foreman.

4. Negligence ⇐48, 52

Owner or occupier of property owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden danger on the premises or to warn them thereof, and adequate warning to or full knowledge by independent contractor of the danger will discharge alternative duty of owner or occupier to warn the employees; overruling Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803.

5. Master and Servant ⇐150(8)
Negligence ⇐55

Independent contractor owes a duty to his employees to warn them of dangers on the premises where they are required to work which are known to independent contractor, and owner or occupier of the premises should not be required to foresee and anticipate that the contractor will not discharge his duty to his own employees.

6. Explosives ⇐7

Burden rested on independent contractor's injured employee, who brought action against occupier of premises where he was injured, to establish that the occupier breached a duty owed to him, and findings of jury that occupier was negligent in failing to take precautions to protect employee from danger of gas escaping from its pipeline did not establish that occupier had breached a duty owed to the employee, inasmuch as that duty could be discharged by warning employee of the danger.

Keys, Russell, Watson & Seaman, James C. Watson, Corpus Christi, for petitioner.

Hubert L. Stone, Jr., Auforth & Bonniwell, Fred C. Auforth, Corpus Christi, for respondent.

CALVERT, Chief Justice.

We granted writ of error in this case to review the holdings of the court of civil appeals with reference to the duty owed by an occupier of land to warn invitee-employees of an independent contractor of dangers on the premises which are not open and obvious.

Respondent, Will Ray Henry, an employee of Roy Vickers Lease Service, an independent contractor, suffered severe in-

juries while prosecuting the work of his employer on premises under the control of petitioner, Delhi-Taylor Corporation. Henry was engaged in welding operations when a dragline bucket, operated by another Vickers' employee, punctured one of Delhi-Taylor's pipelines which contained toluene, a highly flammable gas. The gas escaped and drifted into a ditch where Henry was working with his welding torch. The gas ignited and Henry was badly burned. His suit for damages was tried to a jury. The jury found that Delhi-Taylor negligently failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover it, and negligently failed to release the pressure on the toluene line before the dragline was used to uncover it, and further found that such negligent omissions were proximate causes of the plaintiff's injuries. The trial court rendered judgment on the verdict awarding Henry a recovery of his damages as found by the jury. The court of civil appeals affirmed. 403 S.W.2d 885. We reverse the judgments of the courts below and here render judgment that the plaintiff take nothing.

Delhi-Taylor owns a refinery at Corpus Christi and owns and operates sixteen pipelines which carry various hydrocarbons from the refinery to the docks on the ship channel. The lines varied from two to sixteen inches in diameter and were buried in the ground at depths varying from four inches to ten feet. Roy Vickers Lease Service was employed by Delhi-Taylor to extend the casings around the pipelines where such lines passed under a private roadway. A dragline was used to uncover a twenty-four inch casing by digging a ditch three feet wide, ten feet deep and twenty-seven feet long. Some of the dirt removed in cutting the ditch was dumped temporarily over some of the other pipelines. Henry went into the deep ditch to weld the casing. The dragline operator then began to use the machine to remove the dirt covering the other lines. It was during this operation that the line containing the toluene was punctured. Toluene was not under pump pressure in the pipeline when it was punctured; that which was in the line was residual and the pressure which caused it to spurt out of the line was static pressure, with some slight pressure from thermal expansion.

[1,2] Vickers and his employees were on the premises as business invitees of Delhi-Taylor. The law is now well established in this State that an owner or occupier of land may relieve himself of liability for harm to his invitees from dangerous conditions on the premises which are not open and obvious by taking proper precautions to protect them from the dangers or by warning them thereof. Halepeska v. Callihan Interests, 371 S.W.2d 368 (Tex.Sup. 1963); Western Auto Supply Co. v. Campbell, 373 S.W.2d 735 (Tex.Sup.1963). The law is equally well established that the owner or occupier owes no duty to his invitees either to eliminate or to warn of dangerous conditions on the premises which are as well known to them as they are to him. McKee v. Patterson, 153 Tex. 517, 271 S.W. 2d 391 (1954); Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497 (1952). In this context of established law, Delhi-Taylor contends here, as it did in the court of civil appeals, that although it may have failed, as the jury found, to take reasonable precautions to protect Henry from the danger of gas escaping from its pipelines, it is nevertheless not liable to Henry because its duty to warn him of the danger was fully discharged by warning given to and knowledge on the part of Henry's employer and his employer's foreman.

The court of civil appeals seems to have assumed that an adequate warning of the danger given to Vickers or to Vickers' foreman would have discharged Delhi-Taylor's duty to Henry; but that court held that the evidence did not establish as a matter of law that the warning given was adequate, and that Delhi-Taylor waived its right to a fact finding on adequacy by failing to request a jury issue thereon. We do not

agree with the holding of the court of civil appeals. It is our opinion that the evidence establishes conclusively that the dangerous condition on the premises which resulted in injury to Henry was, in the light of the warning given, as well known to Vickers and his superintendent-foreman, Bernie B. Smith, as it was to Delhi-Taylor.

Both Vickers and Smith had many years' experience in working on and around pipelines carrying petroleum products. Vickers had devoted a good bit of his time during fifteen years in the business to work which "necessitated the uncovering of buried lines," and was "thoroughly familiar with the work." According to him, it is "a fairly common practice" to uncover pipelines with a dragline, and "lots of times" he had used a dragline to uncover "loaded lines" or "gas lines under pressure." Smith had been district superintendent for Vickers for five years and had seventeen years' experience working around loaded pipelines. He had worked for a number of employers and had been a pipeline superintendent where he "had a double dose of loaded lines." According to Smith, the precautions to be taken when working around pipelines are standard, i. e., "* * * any existing line, you assume to be loaded * * *"

The very work which Vickers undertook for Delhi-Taylor was the uncovering of the dock loading lines and the placing of the lines in casings. Both Vickers and Smith were shown a plat of the lines before the work began. They knew the horizontal position but not the depth of the several lines. Smith knew of the general location of the lines from work done at the Delhi-Taylor plant on a prior occasion. He testified that everybody who worked around there knew the area as "pipeline alley."

Robert F. Wright who represented Delhi-Taylor in negotiating the contract with Vickers, testified that he made clear to Vickers and Smith that some of the lines would be in use carrying inflammable hydrocarbons while the work was being done; and that both were told that they should treat all the lines "as though they were loaded" and "as if they were under pressure." His testimony was not denied by either Vickers or Smith. Indeed, Smith confirmed the warning; he testified that Mr. Perkinson, Delhi-Taylor's foreman, "certainly did" make it "pretty clear that those lines were loaded"; that "Everybody knew it." As a matter of fact, Smith testified that he warned the dragline operator that "the lines were loaded," which, "in pipeline work," means "that the line is dangerous" and can be carrying any kind of "inflammable material," including "gasoline or natural gas."

[3] On the basis of the evidence set out, we hold that the warning given to Vickers and his foreman that the lines should be treated "as though they were loaded," when considered with their knowledge of the condition of the premises and the dangers inherent therein, was adequate to discharge Delhi-Taylor's duty to Vickers and his foreman. This holding brings us face to face with the question of whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the landowner or occupier to warn the employees of the independent contractor; and we hold it will.

[4] Our holding here is diametrically opposed to the holding made in Galveston-Houston Elec. Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803 (1924); and to hold as we do in this case, we must, and do, overrule that decision. In that case Reinle, an employee of an independent contractor performing services for Galveston-Houston Electric Ry. Co., was electrocuted when a boom he was operating came in contact with, or in close proximity to, an uninsulated high-voltage wire. We gave the following answer to a question certified by the court of civil appeals (258 S.W. 806):

"The court answers that it was the duty of the interurban company to exercise ordinary care to give Reinle notice or warning of the danger of the boom con-

ing in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger."

Our opinion in *Reinle* and the record in the case on file with this court show that the issue decided was squarely presented. There is no sound basis for distinguishing that case from the instant case. *Reinle* must either be followed or overruled. With due respect for the rule of *stare decisis*, we are convinced that the rule of *Reinle* imposes an unfair and, indeed, an intolerable burden on an owner or occupier of land who employs an independent contractor to do work or to perform services on the premises. While an owner owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden dangers on the premises or to warn them thereof, an adequate warning to or full knowledge by the independent contractor of the dangers should and will be held to discharge the landowner's alternative duty to warn the employees.

There is no need to write at length in justification of our holding. It is in harmony with late court of civil appeals decisions. See Tyler v. McDaniel, 386 S.W.2d 552 (Tex.Civ.App.—Dallas 1965, writ ref'd n. r. e.); Texas Elec. Serv. Co. v. Holt, 249 S.W.2d 662 (Tex.Civ.App.—Fort Worth 1952, writ ref'd n. r. e.). It is in harmony with two late decisions of the United States Court of Appeals for the Fifth Circuit. See Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960); Turner v. West Texas Util. Co., 290 F.2d 191 (5th Cir. 1961). It is also in harmony with a number of decisions from other jurisdictions. See Storm v. New York Tel. Co., 270 N.Y. 103, 200 N.E. 659 (1936); Schwarz v. Gen. Elec. Realty Corp., 163 Ohio St. 354, 126 N.E.2d 906 (1955); Levesque v. Fraser Paper Ltd., 159 Me. 131, 189 A.2d 375 (1963); Hunt v. Laclede Gas Co., 406 S.W.2d 33 (Mo.Sup. 1966). The rationale for the holding can be found in the cited cases.

[5] On many projects there are a number of independent contractors, each employing scores of workmen. The identities of some of the workmen will change from day to day. To impose the duty on the owner or occupier of the premises to know and to warn every workman on the project of a dangerous condition would subject him to an impossible burden. Moreover, an independent contractor owes a duty to his employees to warn them of dangers on the premises where they are required to work which are known to him. This duty was recognized in *Reinle*. 258 S.W. 803, 805. The owner or occupier should not be required to foresee and anticipate that the contractor will not discharge his duty to his own employees, and there is no sound basis for requiring that the employees should be twice warned.

[6] The burden was on Henry to establish that Delhi-Taylor breached a duty owed him. McKee v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (1954). He obtained jury findings that Delhi-Taylor was negligent in failing to take precautions to protect him from the danger of gas escaping from its pipeline. These findings did not establish that Delhi-Taylor had breached a duty owed him inasmuch as the duty owed him could be discharged by warning him of the danger. Not only did Henry fail to obtain a jury finding of breach of the duty to warn, but the evidence establishes conclusively, as pointed out herein, that the duty was not breached. The judgment in Henry's favor cannot stand.

The judgments of trial court and court of civil appeals are reversed and judgment is here rendered that plaintiff take nothing.

any contractual relations between the parties providing for attorney fees or expenses. We quote from Turner v. Turner, Tex.Sup. Ct., 385 S.W.2d 230, 233, as follows:

"The general rule of law in this state is that, unless provided for by statute or by contract between the parties, attorney's fees incurred by a party to litigation are not recoverable against his adversary either in an action in tort or by suit upon a contract. Van Zandt v. Ft. Worth Press, 359 S.W.2d 893, 896(5), Tex.Sup. 1962; Perry v. Leuttich, 132 Tex. 159, 121 S.W.2d 332, 333 (2-4), 1938; Wm. Cameron & Co. v. American Surety Co. of New York, 55 S.W.2d 1032, 1035 (3), Tex.Com.App., 1932; Sherrick v. Wyland, 14 Tex.Civ.App. 299, 37 S.W. 345, 1896"

We feel that such rule of law is applicable here.

[12] The judgment included recovery by plaintiff of $955.00 in attorneys fees, and $94.59 in expenses, to be paid from money on deposit with the court, and with appellees' attorney. Since only the appellants, representing a 1/12th interest in the property and the proceeds, have appealed, and since they alone have complained of the allowance of the attorneys fees, it is our holding that the judgment be reformed so as to deduct 1/12th of the sum allowed as attorneys fees, and expenses, and add such amount to the appellants' portion of the sums on deposit decreed to be distributed to the joint owners of the property.

Consideration of appellants' remaining points Nos. 11, 12, and 13 is, by their brief, made to depend upon the correctness of their contentions that the title to this land remained in or reverted to appellants, as raised in their points 1-8 inclusive. Since we have overruled these points and held adversely to these contentions, points 11, 12, and 13 are also overruled.

The judgment of the trial court is reformed, so that the amount of attorney's fees and expenses allowed to plaintiffs' attorneys is reduced by 1/12th thereof, and such 1/12th is added to the sum ordered to be paid to appellant Della Portia Clark in the distribution of the assets on deposit in the registry of the trial court.

Costs of the appeal are assessed two-thirds against appellants and one-third against appellees.

Reformed and affirmed.

DELHI-TAYLOR OIL CORPORATION, Appellant,

v.

Will Ray HENRY, Appellee.

No. 125.

Court of Civil Appeals of Texas.

Corpus Christi.

May 12, 1966.

Rehearing Denied June 9, 1966.

Invitee brought action against occupier of premises for personal injuries sustained while working as a welder on premises under occupier's control. The 28th District Court, Nueces County, Horace S. Young, J., rendered judgment for invitee and occupier appealed. The Court of Civil Appeals, Nye, J., held, inter alia, that warning that pipelines were charged, meaning that they were under pressure from gas contained in them, was not a warning of danger sufficient as a matter of law to charge invitee with knowledge and appreciation of the risk and danger of working on pipelines.

Affirmed.

1. Negligence ⇐32(1), 48

Occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees

and has a duty to inspect and discover dangerous conditions.

2. Negligence ⇐48

Occupier of premises has duty to protect his invitees from dangers of which occupier knows or because of his duty to inspect should know in the exercise of ordinary care.

3. Negligence ⇐50

Occupier of premises is under a duty to take such precautions as a reasonably prudent person would take to protect invitees from dangers which are not open and obvious or to warn them thereof.

4. Negligence ⇐121(1)

In the no duty invitee cases, where danger is alleged to be open and obvious, plaintiff must prove existence of a duty on part of occupier of premises and a breach of that duty.

5. Negligence ⇐68

Invitee may assume premises are in good condition and is under no duty to inspect them for defects.

6. Negligence ⇐105

If after being warned of danger on premises, invitee nevertheless proceeds to encounter the danger, he does so at his own risk.

7. Explosives ⇐7

Warning that pipelines were charged, meaning that they were under pressure from gas contained in them, was not a warning of danger of gas explosion as a matter of law, sufficient to charge plaintiff, who was an invitee and who was injured in gas explosion while working as a welder, with knowledge and appreciation of the risk and danger of working on pipelines.

8. Negligence ⇐52

To discharge duty of warning of danger on premises, occupier must give invitee both knowledge of the danger and an appreciation of the danger.

9. Explosives ⇐7

Occupier of premises who knew that dragline could puncture lines containing flammable gas and who knew that invitee was welding with a lighted torch in the immediate proximity of dragline operations had a duty to warn invitee so that invitee could have knowledge and appreciation of the danger involved.

10. Trial ⇐388

Occupier of premises who did not request, in invitee's action for injuries, issue as to whether it warned invitee of danger on the premises waived defense of warning. Rules of Civil Procedure, rule 279.

11. Explosives ⇐7

Finding that occupier of premises could have foreseen that dragline might puncture pipeline containing toluene gas under pressure and that flammable hydrocarbons would then be ignited by the operation of invitee's welding torch was supported by evidence, including evidence that occupier's job supervisor had seen such a thing happen before.

12. Explosives ⇐7

Danger from pipelines containing flammable gas was not as a matter of law open and obvious to invitee who was welding a pipeline with a lighted torch in immediate proximity of dragline operation where dragline punctured pipeline and invitee was injured in resultant fire.

13. Negligence ⇐52

If premises occupier's superintendent observed an employee of independent contractor, who was working on premises, at-

tempting to perform a dangerous act it was his nondelegable duty to notify or warn employee of danger.

14. Trial ⇐366

Occupier who did not request issue as to whether it would be negligence for dragline operator to drop bucket from great height onto gas pipeline waived defense of dragline operator's negligence in action by invitee for injuries sustained from fire that broke out when dragline bucket punctured pipeline containing flammable gas near where invitee was using a lighted welding torch. Rules of Civil Procedure, rule 279.

15. Explosives ⇐7

Occupier for whom invitee was engaged in welding work on a pipeline containing flammable gas when he was burned after dragline bucket punctured pipeline had duty to reduce danger to invitee by releasing pressure in pipeline where he knew location of pipes, knew which pipes were under pressure, and was capable of releasing pressure.

16. Negligence ⇐10

Although one is generally not required to anticipate the negligent conduct of another, where one has knowledge of facts which place him on notice that an accident might occur, the negligent conduct of another party does not prevent a finding of negligence on part of the one who had notice.

17. Appeal and Error ⇐1064(1)
Explosives ⇐7

Failure to instruct jury on anticipated negligent conduct or on definition of a contractor was not error, or if error was harmless, in action by invitee for injuries sustained when flammable gas ignited while invitee was working as a welder on premises under occupier's control where occupier knew that gas pipelines were under pressure, that dragline bucket was capable of puncturing a line and that if line was punctured gas could be ignited by invitee's lighted welding torch. Rules of Civil Procedure, rule 434.

18. Explosives ⇐7

In action for injuries sustained by invitee when flammable gas ignited while invitee was working as a welder on premises under occupier's control, admission of evidence as to safety of using a dragline to uncover pipelines carrying flammable gas was not error where evidence was cumulative to other evidence that concerned dragline operations and had been received without objection by occupier.

19. Appeal and Error ⇐1170(7)

Even if admission of evidence concerning safety of use of dragline to uncover pipelines carrying flammable gas was error in action by invitee to recover for injuries sustained when gas ignited while invitee was working as a welder on premises under occupier's control, error was harmless since it was not determinative of any ultimate issues and was not such as to cause rendition of improper judgment. Rules of Civil Procedure, rule 434.

20. Negligence ⇐124(1)

Evidence as to indemnity provisions in rate schedule of contract between invitee's employer and occupier was not erroneously excluded in action by invitee for injuries sustained while working as a welder on premises under occupier's control.

21. Appeal and Error ⇐1170(7)

In action by invitee for injuries sustained when flammable gas ignited while invitee was working as a welder on premises under occupier's control, any error in permitting testimony by expert witness as to construction job done for navy involving gasoline lines was cured by elaboration on cross-examination. Rules of Civil Procedure, rule 434.

22. Damages ⇐132(7)

Award of damages totaling $105,306.52, including award of $85,000 for past and present physical pain and mental suffering and loss of earning capacity, was not excessive where invitee's medical expenses totaled nearly $20,000, invitee, whose life expectation was approximately 30 years at time of accident, was permanently disabled from doing any active outdoor work, invitee was severely burned over 85% of his body with second and third-degree burns, his entire face was covered with first-degree burns with some resultant scarring, he sustained loss of motion in left elbow and hand and permanent injury to left leg and he was hospitalized for three months, much of the time in severe pain which was not controlled by drugs because of possibility of addiction.

James C. Watson, of Keys, Russell, Watson & Seaman, Corpus Christi, for appellant.

Fred C. Auforth, Hubert L. Stone, Jr., Corpus Christi, for appellee.

OPINION

NYE, Justice.

This is a personal injury suit. Will Ray Henry, the appellee, brought suit against Delhi-Taylor Oil Corporation to recover damages for extensive burns received by him while working as a welder on the premises then under the control of Delhi-Taylor Oil Corporation, the appellant here.

The case was tried to a jury, and in response to the answers of special issues, judgment was entered in favor of Henry for the sum of $105,306.52. The Hartford Accident and Indemnity Company, one of the appellees, the workmen's compensation insurer for the employer of Henry, intervened to recover the sum of $32,986.52 to which it was subrogated. Its appearance was only for the court and was not shown to the jury.

Delhi-Taylor Oil Corporation, the appellant, engaged Roy Vickers Lease Service to do some rather extensive work on its pipelines running from its refinery in Corpus Christi to the docks on the ship channel at the Port of Corpus Christi. The appellant owned and operated sixteen pipelines which carried various hydrocarbon products from the refinery to the port. These dock loading lines ran generally downhill from the refinery to the port and across property owned by Columbia Southern Corporation from whom appellant had obtained an easement of right-of-way. Columbia Southern had decided to widen its entrance roadway which crossed at right angle to these pipelines. Under the provisions of the easement agreement, Columbia Southern notified appellant that it must extend the casings around each of the pipelines so that road material could be placed on top of the pipes and the road widened at that point. These sixteen pipelines had been installed periodically by the appellant over the past thirty years as the need demanded. The lines varied from two inches to sixteen inches in diameter and were buried in the ground at depths varying from four inches to ten feet.

The particular job that the appellant was undertaking called for extending the casings (simply placing a larger pipe around each pipeline so that any of the pipelines could be removed thereafter at any time from under the road without disturbing the road material) as a part of phase one of this job. Phase two of the job was the cutting and lowering of all of the pipelines to a particular uniform depth. This second operation required that all the lines be drained and emptied.

Appellant hired Vickers to do the work on a labor and equipment rental basis. This was required by the appellant because it was most difficult to ascertain in advance the exact type of work that needed to be performed because of the age and condition of some of the pipelines. Some of the pipelines had corroded and would be in need of welding repairs, doping and wrapping

before they were put finally at rest underneath the road. No one knew how much work would be required. Vickers submitted to appellant its standard printed rate schedule outlining the hourly rates for each man and the type of work they would perform and the various types of equipment proposed to be used on the job. Other than submitting the printed rate schedule to the appellant, the contract of employment was oral. It was understood that the appellant would furnish a construction superintendent who was to consult with and determine what repairs were to be made to the existing pipelines. He would represent the appellant at the jobsite and determine to his satisfaction the progress of the work. It was further understood that the contract of employment could be terminated at any time by the appellant's superintendent.

In addition to the casings for the sixteen dock loading lines, appellant had a large twenty-four inch casing in the easement and under the existing entrance roadway which had no pipelines running through it, as it was for future use only. This large two foot casing was buried approximately ten feet deep and was also to be extended by Vickers. It was necessary for a huge ditch to be excavated into which a casing extension would be lowered and welded to the existing casing. At first the ditch was being dug by a back-hoe (a tractor with a flexible digging arm) but it became obvious that this machine could not complete the job. Appellant's superintendent, Perkinson, directed Vickers to bring out a dragline to perform this excavation. The ditch was to be three feet or more wide, twenty-seven feet long, and approximately ten feet deep. The amount of dirt removed from the excavation was voluminous. Part of the dirt was placed on the side of the road and the rest of it in the easement which was an overburden on the existing pipelines in the easement.

After the ditch had been dug, a twenty-four inch casing pipe was lowered into the ditch by a special machine and held in place so that it could be welded onto existing casing under the road. Henry, the appellee, was an employee of Vickers and was ordered down into the ten foot hole to weld the two pieces of twenty-four inch pipe. Unknown to him, the dragline was moved around some twenty or thirty feet from the existing hole, to remove the pile of dirt overburdening the existing pipelines so that the next pipe could be uncovered and casing placed around it.

Mr. Perkinson, the appellant's superintendent, watched the dragline dig the large ditch and then move over and uncover the lines. He then left the jobsite to return a transit to his office. While Perkinson was gone the dragline operator continued to uncover the lines and as he was uncovering a second line, the teeth of the dragline bucket punctured a ten inch dock loading line containing liquid toluene under pressure. Toluene is a highly flammable hydrocarbon petroleum product described as being similar to gasoline and which is sometimes used as a blend to gasoline. The fluid toluene spirted up into the air, arched over and downwind some twenty feet and into the hole where the appellee Henry was welding, saturating his clothing. The toluene ignited from Henry's torch and the entire hole became a mass of flames, burning Henry over approximately eighty-five per cent of his body, with first, second and third degree burns. He was able to extricate himself from the hold and fellow workmen were able to tear off his clothes and put out the fire. As a result of his burns appellee Henry was in the hospital some three months, incurring medical expenses of approximately $20,000.00.

The toluene line which sloped from the refinery toward the dock was not under pump pressure at the time, but the line was full of toluene under static pressure, and possibly a slight pressure from thermal expansion. The static pressure was described as being the weight of the liquid in the pipeline from the point of puncture uphill to the refinery. It was likened to a barrel full of liquid with a hole punched in at the bottom. The weight of the liquid

would squirt the fluid out until it had drained down to the hole. As soon as the line drained to the point where the pipe was punctured, the toluene ceased to flow and the fire at the jobsite was quickly brought under control by fire-fighting equipment.

The work to be performed by Vickers and his employees was considered to be very hazardous. Both Mr. Wright, appellant's engineer in charge of contractual arrangements, and Perkinson, appellant's onsite superintendent, had considered the work as being hazardous. Perkinson had considered that one of the hazards was exactly what had happened on this occasion. He admitted that while he was supervising another pipeline job for the appellant's plant, some five years previous to this accident, a dragline bucket had punctured a pipeline. Both parties admit that Vickers and his personnel were business invitees.

Appellee Henry plead that defendant-appellant owed him a duty to provide him with a safe place to work; that appellant owed him a duty to inspect the premises and to warn such invitees at the jobsite of dangerous conditions discovered by such inspection, as well as dangerous conditions known to appellant by reason of its intimate knowledge of the pipelines from the date of their original installation to the time of the accident. Pleading further, appellee contended that the appellant owed said business invitees that additional duty to take such action to protect them from injuries as would have been taken by a reasonably prudent controller of the premises. Appellee Henry plead that the appellant knew that the pipeline which sprayed toluene on appellee Henry contained toluene under pressure, that the appellant knew that the dragline was being used to uncover pipelines and that such operations carried with it the risk of rupturing such pipes. Appellee Henry contended that appellant breached and violated the duty owed to the appellee. Among others, the appellee plead that the appellant breached and violated the duty to release the pressure on the toluene line before the dragline was used to uncover the same, and to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover the same.

The defendant-appellant, Delhi-Taylor Oil Corporation, answered contending that it was guilty of no negligence and violated no duty to appellee Henry; that Vickers, appellee's employer, was an independent contractor, and knew of the method of doing the work and the work to be accomplished by the dragline, and was aware that there were numerous pipelines in the area transporting petroleum products which were highly inflammable; appellant denied that its job superintendent Perkinson was in control of the work and at no time intended to direct the detailed operations or methods in which the work was to be conducted. Appellant specifically denied that it owed any duty to Henry, the appellee, or to any other employees of Vickers to provide them with a safe place to work, as this was the obligation of Vickers only. Appellant plead further that the accident was not caused by any negligence or any breach of any duty on the part of appellant, but was solely caused by the acts or failure on the part of the dragline operator, the employee of Vickers. Pleading further, appellant answered that the injuries to Henry were the result of an unavoidable accident or were proximately caused by a new and intervening agency or a new and intervening cause so that if there was any negligence or breach of duty on the part of appellant, it constituted a mere prior or remote cause and that the acts and failure of the dragline operator constituted an immediate and producing cause of the injuries.

The jury, in answer to a number of special issues found: (1) That the defendant Delhi-Taylor Oil Corporation had the right to control the pressure in the toluene line on the occasion in question; (2) that Delhi-Taylor Oil Corporation failed to release the pressure on the toluene line before the dragline was used to uncover the same; (3) that that was negligence, (4) and a proximate cause of the injuries in question;

(5) that the appellant Delhi-Taylor Oil Corporation failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover the same, (6) and that that was negligence, (7) and a proximate cause of the injuries in question. (8) The jury further found that appellant Delhi-Taylor Oil Corporation had the right to control which machines were to be used to uncover the toluene line; (9) that appellant did not direct Vickers' foreman to use the dragline to uncover the toluene line in question. (Special Issue No. 10 inquired as to whether Special Issue No. 9 was negligence; it was not answered and Special Issue No. 11 as to proximate cause being conditionally submitted, was also not answered). (12) The jury found that the toluene line was punctured by the dragline bucket being dropped on it; (13) they found that the dropping of the dragline bucket was not the sole proximate cause of the injuries to Will Ray Henry; (14) the injuries to Henry were not the result of an unavoidable accident; (15) that the damages sustained by Henry as a direct result of his injuries amounted to $85,000.00; (16) that the doctors, hospital, nursing, and other medical expenses incurred by Henry amounted to $19,806.52, and (17) future medical in the amount of $500.00.

The appellant did not plead the affirmative defense of volenti non fit injuria, nor did it plead that if it owed a duty to Henry, that it protected or warned. The appellant did not rely upon the common law issues of contributory negligence and proximate cause.

Prior to the commencement of the work, the appellant's engineer told Vickers and his foreman that all of the sixteen dock loading lines were to be considered as "loaded". Both parties agree that the condition of the premises and the dangers were not open and obvious of which invitees knew or of which they were charged with knowledge as a matter of law. It was also undisputed that there was no protection given to the business invitee or his servants of the dangers complained of.

Appellant's first point is that the trial court erred in entering judgment for appellee because under the facts of this case as a matter of law, appellant as an occupier of the premises owed no duty to appellee as an invitee on the premises, except to warn of existence of flammable materials in the pipelines, and this duty was discharged by the warning given by appellant to the employer, and the employer's superintendent, of appellee.

[1-6] The occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees. This includes a duty of the occupier to inspect and discover dangerous conditions. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853 (1950); Genell, Inc. v. Flynn, 163 Tex. 632, 358 S.W.2d 543 (1962). This duty on the part of the occupier of premises is to protect his invitees from dangers of which he, the occupier, knows, or because of his duty to inspect, of which he should know, in the exercise of ordinary care. "* * * If there are dangers which are not open and obvious, he is under a *duty* to take such precautions as a reasonably prudent person would take to protect his invitees therefrom or to warn them thereof. * * *" Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, at page 378 (Supreme Court 1963). In the "no duty" invitee cases the plaintiff must prove the existence of a duty on the part of the occupier and a breach of that duty. This burden is carried into the wording of the special issues. This duty of the occupier of the land or premises as to his invitees, is the duty to keep the premises in a reasonably safe condition. His duty is defined to require that he inspect the premises to discover defects and dangers. On the other hand the invitee may assume that the premises are in good condition. He is under no duty to inspect them for defects. The occupier has a duty to protect

his invitees from dangers of which he, the occupier, knows or which because of his duty to inspect, he should know. If the premises are unsafe, the duty of the occupier is to warn or protect the invitee. For if the premises are unsafe and the danger is not open and obvious, how can the plaintiff know and appreciate the danger if he is not warned? If, however, after being warned, the invitee nevertheless proceeds to encounter the danger, he does so on his own risk. The duty is to protect or warn. The doing of either discharges the occupier's duty.

[7-10] Here the plaintiff plead that the pipelines under pressure were a dangerous condition and that the appellant had the duty to control the pressure in the toluene line on the occasion in question. The jury found that the appellant had the right to control the pressure in the toluene line and failed to release the pressure on the toluene line before the dragline was used to uncover the pipeline and that was negligence and a proximate cause of appellee's injuries. The jury found that appellant failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used and that was negligence, and a proximate cause of the injuries. Since this danger was not open and obvious as a matter of law, and it is undisputed that the appellant did nothing to protect or make the premises reasonably safe for this particular work, then appellant's only defense hinges on whether or not the appellee was warned. Was the general warning sufficient to charge the appellee (or the appellee through his employer) with knowledge and appreciation of the dangerous condition? It was the clear holding of the Supreme Court in Robert E. McKee, General Contractor v. Patterson, 153 Tex. 517, 271 S.W. 2d 391 (1954), in Dee v. Parish, 160 Tex. 171, 327 S.W.2d 449 (1959), in Halepeska, supra, and in the recent decision of the Supreme Court in Ellis v. Moore, Tex., 401 S.W.2d 789 opinion of Court of Civil Appeals, 385 S.W.2d 261, that knowledge is not enough.

"* * *. There must be knowledge of the danger involved and the appreciation of the danger. This Court pointed out in Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953), that there must be knowledge and appreciation of the particular danger involved so that the plaintiff proceeds to encounter the risk as the result of an intelligent choice. * * * Where the assumed risk doctrines of 'no duty' or volenti are invoked, the duty of the defendant is to exercise ordinary care to make reasonably safe or to warn. * * * The function of the warning is to give the plaintiff knowledge and an opportunity to appreciate the danger. He then can decide whether to confront the danger. * * *" Ellis v. Moore, supra.

Here the appellant argues that he warned appellee's employer to the effect that the lines were "charged". Even if there was a general warning, we cannot say that this was a warning of the danger as a matter of law, sufficient to charge the appellee with knowledge and appreciation of the risk and danger. In Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497, our Supreme Court held that the basis for liability in the "no duty" case is the superior knowledge of the danger on the part of the occupier. The appellant knew that the lines were under pressure of highly inflammable hydrocarbons. The appellant knew that a dragline was operating in, around and over these lines. The appellant knew that a dragline could puncture one or more of the pipelines (the job superintendent had a similar experience before). The appellant knew further that the appellee was welding with a lighted torch in the immediate proximity while the dragline was operating. Appellant did not say, "you better not use the dragline while the welder is operating with a lighted torch." The appellant did not say that the welder should cease welding while the dragline was operating in the proximity of the pressurized lines. The appellant did not tell the appellee's employer to cease these operations until they could

release the pressure on the pipelines. Appellant did not say that these operations should be conducted with hand tools or other devices. There was no complete disclosure of the danger. We hold that the appellant had a duty to warn, so that the appellee could have had the knowledge and appreciation of the danger involved. This was not done. There were no issues requested or submitted by appellant as to warning, nor did appellant plead that he warned appellee. If appellant wished to escape legal responsibility, by relying upon warning, then the appellant had the responsibility to request an issue as to whether it had warned the appellee. Western Auto Supply Company v. Campbell, 373 S.W.2d 735, (Supreme Court 1963). Since appellant did not request such an issue, then it was waived. Allen v. American National Insurance Company, 380 S.W.2d 604, (Supreme Court 1964); Rule 279, Texas Rules of Civil Procedure.

In Wood v. Kane Boiler Works, 150 Tex. 191, 238 S.W.2d 172 (1951), the plaintiff's knowledge that some of the pipe might be defective (here, that the pipelines were loaded) was much greater than in the instant case, where appellant's superintendent had made only a general statement to the contractor's foreman before appellee's employment to consider the lines loaded. Appellee had no specific knowledge thereof. In Halepeska the Court said that the decision to incur the risk must have been deliberate * * * a result of an intelligent choice. Harvey v. Seale, 362 S.W.2d 310, (Supreme Court 1962). The Court further stated that the duty owed was "* * * a complete disclosure of the danger." The nature of the warning must be such that the invitee is vested with full knowledge of the nature and extent of the danger involved such that, knowing of the particular risk involved, he can make an intelligent choice between retreating from that danger or exposing himself to it. Chickasha Cotton Oil Company v. Holloway, 378 S.W.2d 695, ref. n. r. e. The knowledge and appreciation that our Supreme Court speaks about, is not present here.

[11] The appellant argues as one of its points, that there was no evidence of foreseeability to support the negligent or proximate cause issues found against it upon which its duty rested. While appellant was under a duty to exercise ordinary care against dangers of which it knew, or dangers of which it should have known, the appellant contends that there was no evidence to show that it should have, in the exercise of ordinary care, foreseen the danger that caused the injury to appellee Henry. This exact contention was made in Ellis v. Moore, supra. There the defendant pointed out that the three-fork lift used by Harold was in good order. Here appellant contends that the pipe was in good condition. There they complained that the use (or mis-use) of the lift caused the injury. Here the appellant complains that the dragline bucket was dropped and its mis-use caused the injury to Henry. In Ellis they contend that it was not the defective cylinder lift which Harold knew to be defective and which he was using, that caused the injury. In this case appellant contends that it was not the pressure in the toluene line which the appellee Henry knew (or was charged with knowledge through his employer) that caused Henry's injuries. In Ellis the defendants contended that as a matter of law they could not foresee that Harold would attempt to use the three-fork hitch to lift the discs and that even if he did, that he would fail to release the clutch if the front end came off the ground and that the tractor would overturn and injure Harold. In our case defendant contends that it could not foresee that the use of dragline and the operation of the lighted torch would cause an injury even if the dragline bucket was dropped and punctured the pressurized toluene line, and that the toluene would spray and ignite appellee. The Supreme Court in Ellis disagreed and said:

"* * * we cannot say as a matter of law that McCrary (defendant) could

not foresee that if Harold did use the three-point hitch, he might not skillfully apply the clutch and throttle when the tractor's front wheels left the ground."

We cannot say as a matter of law that appellant could not foresee that the dragline might puncture the toluene line under pressure and that flammable hydrocarbons would be ignited by the operation of Henry's welding torch.

The defendant did not plead volenti non fit injuria nor did it request or submit an issue as to whether or not a danger existed to which the appellee voluntarily exposed himself. Volenti non fit injuria is not in this case.

[12] Appellant contends that Vickers was an independent contractor and although the relationship of appellant and appellee was that of an owner and occupier of the premises and a business invitee, the appellant owes no duty to the appellee except the exercise of ordinary care to keep the premises safe for the use of persons invited to use the premises for business purposes. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950); Robert E. McKee General Contractor v. Patterson, supra. Appellant argues in effect that when a business invitee performs a particular job as an independent contractor, he is in effect charged with knowledge of the dangers incident to such work, and that the owner has no duty to warn such invitee with respect to conditions which are as a matter of law, open and obvious, and that he takes the premises as he finds them. Appellant says there is no duty on the part of the owner to protect such invitee even by the use of reasonable precautions to eliminate the hazards. Citing Marshall v. San Jacinto Bldg., Tex.Civ.App., 67 S.W.2d 372, wr. ref.; Harvey v. Seale, 362 S.W.2d 310 (Supreme Court 1962). Appellant pleaded in effect that it owed no duty as a matter of law because the danger and/or condition was so open and obvious that as a matter of law it was not liable for the injuries. We fail to see the relevancy of appellant's argument under the facts of this case. The danger was not open and obvious as a matter of law.

[13] Appellant argues that it retained no control over the work except to see that the work was performed satisfactorily. Appellant argues that the general rule is that the owner-contractee is not liable for injuries sustained by employees of an independent contractor in the performance of the work which has been engaged; that although an exception to the general rule exists where the employer of the contractor retains control over the operative details and the right to direct the manner in which employees of the contractor perform their work, this exception did not apply to the appellant since it did not exercise that degree of control. Citing Allen v. Texas Electric Service Company, 350 S.W.2d 866, Tex.Civ.App., ref. n. r. e. (1961). Although appellee's employer was called an independent contractor he was nonetheless a business invitee. Appellant's superintendent was present at the jobsite and knew and observed the work that was being performed. He had the right to control which machines were to be used (the jury so found) and what work was to be done. If appellant's superintendent observes an employee of an independent contractor attempting to perform a dangerous act it is his nondelegable duty to notify or warn said employee of such danger. Texas Electric Service Co. v. Holt, 249 S.W.2d 662 at 667, Tex.Civ.App. 1952, ref. n. r. e. The mere fact that Vickers was called an independent contractor does not mean that appellant did not retain extensive control as to general and specific results of the work. In any respect the mere fact that appellee's employer was an independent contracter is not determinative under the facts of this case, for if it was a factor, then the Halepeska, Bosworth, Knoten, Smith and Albritton cases and other authorities would not be in point. Halepeska v. Callihan Interests, Inc. (Supreme Court 1963), 371 S.W.2d 368; Continental Paper Bag Co. v. Bosworth (Tex.

Civ.App.1919) 215 S.W. 126; Sun Oil Co. v. Kneten, 5 Cir., 164 F.2d 806; Smith v. Henger, supra; Sunray Oil Corporation v. Albritton, D.C., 88 F.Supp. 54; 5 Cir., 187 F.2d 475, Appellee's employer's contract was upon an equipment rental hourly basis and his employment was determinative at the will of appellant.

Appellant contends in his fourth point that as a matter of law, the negligence of the dragline operator in allowing the dragline bucket to drop from a height of approximately five feet constituted the sole cause of appellee's injuries or that it was a new and independent cause breaking any causal relationship between the pressure in the toluene line and the fire which injured appellee. Appellant argues that the dragline bucket was negligently and carelessly dropped onto the toluene line from approximately five feet in a free fall with the bucket teeth pointing straight down.

[14] The question of whether the dragline bucket was dropped or not and from what height, was a hotly disputed fact issue. In fact, appellee contends that the greater weight and preponderance of the testimony was to the effect that the bucket was not dropped. It is not necessary for us to decide this contention of the appellee. Appellant did not request any issue as to whether it would be negligent conduct for a dragline operator to drop the bucket from the height at which it was dropped. If the negligent and careless operation of the dragline was a part of appellant's defense of contributory negligence, as it argues now in this court, then the burden of requesting this issue and the securing of a favorable jury answer thereon, was on the appellant, in view of the conflict in the evidence. Since it was not requested it was waived. Rule 279, T.R.C.P.; Goodwin v. Southtex Land Sales, 243 S.W.2d 721, Tex.Civ.App. 1951, ref. n. r. e.

In any respect this point of appellant is overruled because the jury found that even if the dragline bucket was dropped it was not the sole proximate cause. Appellant's points one through five are overruled.

Appellant's points six through fifteen are briefed together and will be considered together by this court. Appellant contends under these points that the trial court should not have submitted special issues 2 through 8 or should have disregarded them on appellant's motion and the trial court should have submitted appellant's requested special instructions to the effect that one is not required to anticipate negligent conduct and a further instruction on the definition of independent contractor.

[15] Appellant argues in effect under these points, that there was no duty to release the pressure in the lines and that there was no evidence that there was a feasible or practical way of completely shutting down the refinery, to drain all of the lines in anticipation of this injury. The evidence showed that the contract was a two phase contract, the second phase of which required that each line be drained and cleaned so that it could be cut, lowered and rewelded into place. The appellant knew which lines were under pressure and which lines were being used, and which lines were not. The evidence showed that the appellant knew that some lines were close to the surface of the ground (four inches), and which lines were deeply embedded in the ground (ten feet). Surely, the lines closer to the surface of the ground or those in the immediate proximity of the operation of the dragline bucket could have been shut down and the pressure released. There was evidence that even on the punctured toluene line when the pressure had been released after the dragline bucket had punctured it, a wooden peg was put in the hole and a piece of metal placed over the hole and it was welded as a patch on all four sides with the line still full of toluene, but not under pressure. There was no explosion or fire. The evidence further showed that the line pressure (atmospheric) could be released by opening a valve at the refinery site, and that the static pressure could be released by the draining of the line at least to a point below where the appellee was

working. We overrule this contention of appellant.

[16, 17] Appellant again argues that the improper operation of the dragline caused the injury. There was no direct evidence of the improper operation of the dragline and no requested issue. We agree as appellant argues, that the general rule is that one is not required to anticipate the negligent conduct of another. De Winne v. Allen, 154 Tex. 316, 277 S.W.2d 95. However, where the appellant has knowledge of facts which place him on notice that an accident might occur, such as in the instant case, the negligent conduct, if any, of another party does not prevent a finding of negligence on the part of the defendant. We do not believe that such contention on the part of appellant here has merit. We see no error in the failure to instruct the jury on anticipated negligent conduct nor the definition of a contractor, as neither instructions are determinative of this case, or if it was error it was harmless by virtue of the other findings by the jury. Rule 434, T.R.C.P. Appellant's points are overruled.

[18, 19] Appellant's sixteenth point contends that the trial court erred in permitting the opinions and conclusions of certain witnesses to be expressed as to whether it was safe or dangerous to use draglines to uncover pipelines carrying hydrocarbon materials. On the other hand, the appellant in its own brief stated that: "All the evidence in the case at bar demonstrated that it was *safe* to use a dragline to remove the overburden from the dock loading lines." Appellant complains that the trial court erred in failing to prohibit certain witnesses from testifying as to whether or not the use of a dragline to remove dirt from the top of the lines would be safe. One of the witnesses testified over objection as to the dangers of the use of draglines where there were existing pipelines carrying flammable hydrocarbons. Appellant on the other hand elicited testimony as follows:

"Q Assuming that there had only been ten inches of dirt over that pipe, in your opinion, was it safe to remove that dirt with a dragline?

A I would say that it wouldn't have been too hazardous, down to the point of the top of the pipe.

Q To use the dragline?

A To use the dragline, yes, sir.

Q Assuming, then, that the surface of the dirt was six inches above the top of that line, would it have been safe to use the dragline to remove that dirt?

A I would say that it wouldn't have been necessary. As far as safety is concerned, whether it would have been safe would hinge a whole lot on the conditions that existed there at the site * * *.

* * * * * *

A * * * I would say six inches would be getting pretty close to the point that if I—if I was the one making the decision to either use the dragline or a hand excavation, I probably would have said, 'Use hand excavation instead of the dragline', as a matter of convenience, and possibly safety."

The statement of facts is quite voluminous covering over one thousand pages. There was a lot of testimony concerning the operation of a dragline. There was considerable evidence concerning dragline operations offered repeatedly by appellee, and received without objection from the appellant. We hold that the overruling of the objections was not error since the evidence was cumulative. In any event since the appellant offered similar evidence from other witnesses concerning the same factual situation its objections will be deemed to be waived. If we be wrong concerning this, it is our opinion that the testimony was not determinative of any ultimate issue in the case as it turned out. We therefore hold that the errors, if any, in the admission of evidence complained of was harmless and

the error complained of was not such as was reasonably calculated to cause or probably did cause the rendition of an improper judgment in this case. Rule 434, T.R.C.P.; Medina Electric Cooperative, Inc. v. Ball, Tex.Civ.App., 368 S.W.2d 227; City of Gladewater v. Dillard, Tex.Civ.App., 312 S.W.2d 530; 1 McCormick & Ray, p. 26, § 27; Sharkey v. Hollums, Tex.Civ.App., 400 S.W.2d 353 (1966).

[20] In appellant's points seventeenth through twentieth, appellant argues that the trial court erred in excluding evidence from the jury as to certain alleged indemnity provisions in the rate schedule of appellant's standard general contract from Vickers (appellee's employer) to appellant. The contract between Vickers and appellant was oral. Vickers testified that prior to the commencement of the work on the job he was not shown the printed general conditions. After the accident had happened, Vickers did sign the purchase order containing the written indemnity agreement offered by the appellant. The rate schedule was introduced into evidence but the trial court physically cut out a clause in the contract before permitting it to go before the jury. This clause stated:

> "It is understood that all work done by us (appellee's employer) for your (appellant's) account is that of an independent contractor, and you are not liable for any of our acts of commission or omission resulting in injuries or damages."

It is appellant's argument that this clause should be admitted and considered by the jury so that (1) they would realize that Vickers was clearly an independent contractor, and (2) that it was intended by appellant and Vickers, that Vickers would be responsible for all acts, whether negligent or not, and that appellant would not be responsible therefor. We have already discussed the independent contractual relationship. If appellant was attempting to cast legal responsibility on appellee's employer by virtue of this contract, then this would be a law point or an action which was not pleaded by appellant, and it is not properly before us. Appellant does not refer us to any case where this type of evidence would be admissible for the purpose intended by the appellant. Appellant's point is overruled.

[21] Appellant next contends that the trial court erred in overruling its objections to the testimony of a certain witness concerning the details of a particular construction job done for the United States Navy where a new aviation gasoline line was joined to an existing line. We have carefully considered all of the testimony of this witness, the objections and the cross examination by the appellant. The witness was qualified as an expert and the testimony complained of was elicited in minute detail by appellant on cross examination. Any harm committed in permitting such testimony to go to the jury was cured by the elaboration on cross examination. We deem it harmless error, if any. Rule 434, T.R.C.P.; Hughes v. State of Texas, Tex.Civ.App., 302 S.W.2d 747, 1958 and cases therein cited.

[22] Appellant's last two points twenty-two and twenty-three, concern the damages awarded by the jury as being grossly excessive so as to demonstrate bias, prejudice and sympathy on the part of the jury; that the damages were so large that a remittitur should be required and that the verdict shows a complete disregard for the evidence. The appellee testified that he was welding with his hood down and noticed a foreign fire in the hole where he was working. He raised his welding hood and found that he was completely surrounded by a wall of flames. On extricating himself from the ditch his entire clothing was afire, save and except his boots. Most of his clothing was burned off. He stood for fifteen minutes being unable to sit down, while waiting on an ambulance. He was severely burned over eighty-five per cent of his body front and back with second and third degree burns. His entire face was covered with first degree burns with some resulting scarring. His ear was burned

deeply. When he was first brought to the hospital he was in profound shock and near death. His left arm and leg were burned very deeply involving the muscle and underlying tissue, leaving a loss of motion in his left elbow and his left hand and permanent injury to his left leg. Other parts of his body were burned to such a degree that there will be no regeneration of muscle and tissue. He was operated on twenty-one or twenty-two times. His treating physician testified that he was totally disabled and is permanently disabled from doing any active work that requires him to be out of doors. He remained in the hospital for three months, much of the time in severe pain which was not controlled by drugs because of possibility of addiction. After he was sent home in December, 1960, his treatment continued for a long time and involved extended physical therapy. His pain continued until and including the date of the trial (1964). It was stipulated that his medical expenses for the treatment of his injuries amounted to $19,806.52. Appellee's earnings prior to the accident were approximately $5,000.00 per year. One of the doctors testified that he will need future surgery to his left leg which was severely burned, including involvement of the underlying tissue. This leg had been bothering him up to the time of trial because of pain and swelling. Appellee was thirty-nine years of age at the time of the accident with a life expectancy of approximately thirty years. The jury awarded appellee $85,000.00 for past and present physical pain, mental suffering and loss of earning capacity, and $500.00 for future medical expenses. We hold that there was sufficient evidence to support the findings of the trial jury and we do not think that the verdict is excessive in view of the age and life expectancy of the appellee, the disability and the severity of the injuries he has suffered. Summers Road Boring, Inc. v. Thompson, 393 S.W.2d 690 (1965, Tex.Civ. App. ref. n.r.e.) and cases cited therein.

The judgment of the trial court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, Relator,

v.

Honorable Horace S. YOUNG and John Hogan, Respondents.

No. 210.

Court of Civil Appeals of Texas.

Corpus Christi.

May 26, 1966.

Original mandamus proceeding by railroad to order district court judge to set aside order declaring mistrial and to enter judgment that motorist take nothing by his suit for injuries suffered in railroad crossing accident. The Court of Civil Appeals, Sharpe, J., held that inability of jury to agree on whether motorist was faced with emergency on occasion of railroad crossing collision did not entitle motorist to mistrial in view of findings that he was contributorily negligent in failing to stop short of the railroad track under conditions prescribed by statute and in failing to keep proper lookout and in absence of finding that the emergency constituted the sole proximate cause of collision.

Writ granted; trial court directed to set aside order declaring mistrial and to enter judgment that motorist take nothing.

1. Automobiles ⇐247

Where a party has been found guilty of primary negligence proximately causing collision, finding that he was acting in an emergency is not conflicting absent finding that emergency constituted sole proximate cause of collision, and the finding of specific negligence overrides the general emergency issue finding, which will be disregarded in rendering judgment.

2. Negligence ⇐142

Finding that a person failed to keep proper lookout does not conflict with the finding that he was acting in an emergency.

NO. A-11582

IN THE

SUPREME COURT OF TEXAS

DELHI-TAYLOR OIL CORPORATION,

PETITIONER,

VS.

WILL RAY HENRY,

RESPONDENT

RESPONDANT'S MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

Respondant respectfully files this his Motion for Rehearing, under the provisions of Rule 515, Texas Rules of Civil Procedure and within the fifteen days provided by such rule, in order that the errors committed by the Honorable Court may be corrected and the ends of justice be served and that upon rehearing that the Court affirm the judgment of the Trial Court and the decision of the Court of Civil Appeals in favor of the Respondant; In the alternative that this Honorable Court remand the case for new trial in accordance with the Supreme Court's direction.

STATEMENT OF THE NATURE OF THE CASE

The statement of the nature of the case by the Petitioner in Petitioner's Application for Writ of Error, and adopted by the Respondant in his Reply to Petitioner's Application for Writ of Error is hereby adopted by reference for the sake of brevity.

PRELIMINARY STATEMENT OF FACTS

The preliminary statement of facts as stated in Respondant's Reply to Application for Writ of Error is hereby adopted by reference for the sake of brevity.

STATEMENT OF POINTS OF ERROR

FIRST POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 279, Texas Rules of Civil Procedure by not deeming any unsubmitted

issues as found in support of the judgment of the Trial Court.

SECOND POINT OF ERROR

The Supreme Court erred in refusing to apply the Rule of "Stare decisis" and overruling Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), thereby denying Respondant his day in Court.

THIRD POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 503, Texas Rules of Civil Procedure, which requires the Court to remand Respondant's case for a new trial.

FOURTH POINT OF ERROR

The Supreme Court erred in that by its decision Respondant has been denied due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution.

ARGUMENTS OF POINTS OF ERROR

FIRST POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 279, Texas Rules of Civil Procedure, by not deeming any unsubmitted issues as found in support of the judgment of the Trial Court.

ARGUMENT UNDER FIRST POINT OF ERROR

The Court by its decision has failed to recognize and apply the provisions of Rule 279, Texas Rules of Civil Procedure. By such failure, the Court erred in its decision and such decision should be corrected and the decisions of the Trial Court and Court of Civil Appeals affirmed.

Rule 279, supra, provides, paraphrasing, that where a "ground of recovery . . . consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery . . . are omitted without request or objection, and there is evidence to support a finding thereon, . . . such omitted issue shall be deemed as found by the Court in such a manner as to support the judgment." The ground of recovery in Respondant's case stems from the rule of law that provides that an owner-occupier owes a duty to the employee of an independent contractor to take reasonable care to provide the employee a safe place in which to work or to warn him of the dangerous condition. The Supreme Court had, as it points out in its opinion, previously ruled in Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), that the warning required by this rule of law was to the employee (Respondant herein) and that warning to the employee's employer was not sufficient to satisfy the duty. At the time this cause of action came into being and throughout all of the proceedings up through presentation to the Supreme Court, this cause of action was prepared and presented in accordance with controlling law and precedents; to the effect that failure of the owner-occupier to

provide a safe place to work together with no warning to the employee by the owner-occupier of the dangerous condition rendered the owner-occupier responsible for injuries suffered by the contractor's employee, proximately caused by the dangerous condition. To establish, as Respondant did here, that the owner-occupier did fail to provide such a safe place in which to work, and admittedly failed to warn the employee, Respondant, the submission of the issue of warning to the employer was unnecessary to submit. At no point in the record is there any indication that Petitioner warned Respondant, which as the Court announced in the Reinle case, was required to discharge this duty. Therefore, under the controlling rule of law that existed, Respondant submitted the controlling issues under his ground of recovery and they were returned by the Jury favorable to him. Furthermore, assuming that the issue of warning should have been submitted or requested and was not, as occured here, under the provisions of Rule 279, supra, this Court is required to consider such issue as found in support of the judgment, which they have failed to do and therein have erred. Without conceeding whether the Court is correct in its reinterpretation of the satisfaction requirements of the duty to warn, the Court can announce the change in the law and affirm the lower courts in the instant case by adhering to the requirements of Rule 279, Texas Rules of Civil Procedure. Respondant respectfully requests the Court to give expression to Rule 279, supra, and find the unsubmitted and unobjected to issue of warning in support of the judgment of the Trial Court and the decision rendered by the Court of Civil Appeals.

Respondant would respectfully further point out that in connection with this same general error supra, the Court assumed the position of a fact finding body in determining that "the evidence established conclusively as pointed out herein, that the duty was not breached." Admittedly Respondant did not secure a Jury finding on warning but as has already been pointed out, under the existing rule of law such an issue was unnecessary and furthermore if it was, then the Court should under Rule 279, supra, find it in support of the judgment rendered in favor of the Respondant. Rule 274, Texas Rules of Civil Procedure, admonishes all that "Trials in the Supreme Court shall be only upon the questions of law . . ." "The Supreme Court has no jurisdiction over matters of fact." Mohundro vs. Matthews, 161 Tex. 367, 341 SW2nd 401, (1961). Decisions in the Trial Court and the Court of Civil Appeals are binding on the Supreme Court. " Pacific Fire Insurance and Company vs. Donald, 148 Tex. 277, 224 SW2nd 204, (1950), "Supreme Court may consider only evidence which tends to support implied findings in support of judgment and must disregard any that leads to contrary conclusion." Bishop vs. Bishop, 359 SW2nd 869. "It is the duty of the Supreme Court to view evidence and reasonable inferences there from most favorably in support of finding of Jury. Jecker vs. Western Alliance Insurance Company, 369 SW2nd 776, 371 SW2nd 904. Therefore Respondant respectfully requests that the Court reconsider its opinion in light of the above, find the unsubmitted issue of warning in support of the judgment and affirm the Trial Court and Court of Civil Appeals. In the alternative, Respondant requests that the Court express the changed rule of law

announced in this opinion and under the provisions of Rule 279, Texas Rules of Civil Procedure, affirm the Trial Court and Court of Civil Appeal. In the alternative Respondant moves the Court remand the case for new trial in accordance with its direction.

SECOND POINT OF ERROR

The Supreme Court erred in refusing to apply the Rule of Stare decisis" and overruling Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), thereby denying Respondant his day in Court.

ARGUMENT UNDER SECOND POINT OF ERROR

The rule of "Stare decisis" is designed to provide reliability and stability in the law. Persons subject to the law "should know what their legal rights are as defined by legal precedent and having conducted their affairs in reliance on such rights they should not have them swept away " Austad vs. Austad, 269 P2nd 284. The action taken by the Supreme Court in its opinion has effectively swept away the rights relied upon by Respondant. Who is to say that Will Ray Henry would have not conducted himself in such a way that he would have avoided injury altogether had the rule of law now announced by this Honorable Court been the rule of law on the day Henry was injured? Not only has the rule change altered who Respondant shall look to for his warning, but in addition how that warning shall be satisfied. Of possibly greater impact is the rule change on the preparation and presentation of Respondant's cause of action. No citations are necessary to point out the manifest injustice that

has been done. One need only consider briefly that had the Court followed the established rule of law laid down in Reinle, supra, this case would have been affirmed. It is so abundantly clear that had the law announced in this opinion been the controlling law, the preparation and presentation would have been to comply with that ground of recovery or another would have been found. However, as this cause of action now stands, Respondant has been denied even the opportunity to prepare and present his cause of action. The very least that should be expected to secure the true ends of justice in a situation where the rules of the game are changed, is that a rematch be declared; but here, the Court, after the winning team has played the game and won under the existing rules, changes the rule and declares with finality that the winner is now the looser. Where is there in such a decision even the resemblance of justice? There is none. For that reason, Respondant respectfully moves the Court to reconsider its decision and if the change in the rule of law must stand, then at least extend to the Respondant the opportunity to play the game under the new rule by ordering that this case be remanded for a new trial.

The action by the Supreme Court does not do justice to the decision in the Reinle Case. In that decision the Court painstakingly plowed through the question of control as to the detail of the work being done. In the opinion here rendered, Respondant respectfully submits that the Court generalized a rule of law thereby denying to this area of the law the detailed analysis that justice and sound law demands.

As the Court in the Reinle case recognized the party "employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand a person causing something to be done, the doing of which casts on him a duty, cannot excape the responsibility attaching to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor . . . but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Citing the Supreme Judicial Court of Massachusetts in Cobat vs. Kingman, 166 Mass. 403, 44NE 344.

The Supreme Court states in their opinion "This holding brings us face to face with the question whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the land owner-occupier to warn the employees of the independent contractor; and we hold it will." As pointed out earlier the Supreme Court is a Court for the trial of law questions only. The facts are established by the lower courts; the interpretation and application of the law to those facts and those facts alone is the obligation of the Supreme Court. The fact question of control was precisely answered by the Jury in the Trial Court and affirmed by the Court of Civil Appeals and this writer suggests that the Supreme Court has ignored the fact that Petitioner was in absolute control of the premises and the dangerous condition. Historically the question of control has been of

supreme importance in establishing what action would satisfy this duty; furthermore, whether this duty, once established could be delegated to another. Yet in the instant opinion the Supreme Court has failed to even consider the question (fact) of control before establishing a sweeping generalization that regardless of who has control, " . . . an adequate warning" to the employer satisfies the duty owed to the employee by the owner-occupier. What of the intrinsically and inherently dangerous situations or conditions? This writer submits that the Supreme Court could have just as easily have found that the toluene lines were inherently dangerous as they found that the " . . . evidence establishes conclusively that the duty to warn was not breached." Assuming this to be true, are we now to consider that the owner-occupier who has absolute control over an inherently dangerous condition can discharge his duty, even delegate the duty to warn or provide a safe place to work by simply giving" . . . an adequate warning to the employer-independent contractor? What has happened to non-delegible duty?

The endless variations in fact situations that are encompassed by the general area of owner-occupier-independent contractor's employee are numberless. To attempt, as the Court has here, to apply a blanket rule of law to such a vast area of materially different situations is to do injustice to this entire area of the law.

The Supreme Court in the Reinle Case continues, "There is no doubt that the independent contractor was under the duty to exercise

ordinary care to give warning to its employees . . . Breach of this duty is not the basis of the interurban company's liability. It is the breach of the interurban company's own independent duty for which it is answerable. Failure of the contractor to perform its duty would in no wise relieve the interurban company from responsibility for the consequences of failure to perform its own duty to the contractor's employees. (emphasis added).

Considerable time in preparation and presentation were devoted by Respondant in establishing this independent duty owed by Petitioner, Delhi. The Supreme Court's generalized expression that the owner-occupier's duty to employees of independent contractor is satisfied when the independent contractor is warned by the owner-occupier does not recognize the varying degrees of control over work being performed that were recognized in the Reinle case. This is and in a long list of cases, some cited by this Court in its opinion, not characteristic of the Supreme Court's decisions. It might well be that under a given set of facts that an owner-occupier's warning to an independent contractor of dangeous conditions would satisfy the duty owned by the owner-occupier to the contractor employees, but not under these facts. Here the Jury found that Delhi controlled the premises housing the dangerous condition. The Court in this opinion has lumped all fact situations involving owner-occupier invitee independent contractor employees into a general catagory, which is contray to the development of the law and diametricly opposed to the reasoning of well settled law.

At the risk of citing a majority opinion that holds contrary to Respondant's position here, consider the Court's statement in the Gulf Oil vs. Bivens case, where speaking to the general statement that an owner-occupier is under a duty to furnish a safe place for employees of an independent contractor, the Court says, "This statement is too broad and is an oversimplification of the principle". In the opinion rendered by this Court in this case, Respondant respectfully submits that the Court's ruling is too broad and is an oversimplification of this principle. This duty under the existing facts cannot be discharged by delegating that duty to another party. The well chosen words of the dissenting opinion in Gulf Oil Corporation vs. Bivens, 276 F2nd 753, are urged to be carefully considered.

> "Here the Court announces a rule which is both internally inconsistent and in conflict with the traditional, and here Texas, approach. As to Restatement #343 (a), the Court recognizes that it was a jury issue whether the iron sulfide gas was present and was a danger of which Bivens was ignorant. In other words, this was tested by the facts. But it then abandons the factual inquiry for jury resolution as to the same kind of issues presented in #343 (b). In the very nature of things, is not the question whether the occupier "(1) has no reason to believe" one of fact? By the same token, is not an inquiry whether the employees "(2) will discover the condition" an obvious one of fact, not law? Is it not even more so as to the crucial one whether the employees will "(3) realize the risk involved therein"?"
>
> "It is entirely possible that on the record of a particular case reasonble minds could accept only the conclusion that a prudent occupier, having given

notice of the peculiar hazard, would not have reason to believe that the employees would be ignorant of the condition or its hazards. In that situation a directed verdict would be compelled. But ordinarily it will not be, as the Court now announces, a decision as a matter of law. What a prudent occupier "has reason to believe" depends on the total setting. This includes the nature or kind of dangerous condition, the kind or type of hazard presented, and a balancing of the possible capacity for harm of an extraordinary nature against the likelihood of the independent contractor effectively relaying the warning to his employees. This depends on facts. And where facts permit conflicting inferences, it is for the trier of fact, not the judge, to declare the result."

"The Court, listing precedents for the rule announced, ignores altogether the cases to the contrary. Both the Ninth and Second Circuits reject this rule that notice to the independent contractor is either notice to the employee or cuts off his rights. Sullivan vs. Shell Oil, 9 Cir., 1956, 234 F2nd 733; Anderson vs. Lorentzen, 2 Cir., 1947, 160 F2nd 173. The Sullivan Case from the Ninth Circuit is particularly persuasive since as that opinion reflects, Texas and California concepts are parallel on the open and obvious danger and voluntary assumption of risk principles." Gulf Oil Corporation vs. Bivens, supra.

At this point Respondant would respectfully point out to the Court some distinguishing characteristics of the cases cited in support of its announced rule of law change. In Tyler vs. McDaniel, 386 SW2nd 552, the injured employee had knowledge of the dangerous condition. It is uncontroverted that Will Ray Henry did not know of the dangerous condition.

It is Respondant's purpose here in pointing out these distinguishing points to add emphasis to the proposition that this area of the law

is not subject to simplification and generalization. Again, not conceeding that the Court is correct in its opinion in this case, it cannot be said in good faith that under a given set of facts that the reasoning of the Court would not be applicable. However, it is Respondant's position that the facts, as were found by the Trial Court, just do not lend themselves to this application of this rule of law. If, however, the Court persists in its determination that the facts are subject to this new rule of law just announced, then Respondant submits that the case should be remanded to be retried under such new rule of law.

In Texas Electric vs. Holt 249 SW2nd 662, the Court in that case was dealing with facts of re-entry into the work area after the work that was to be done had been done and the premises released to the owner-occupier. There was no re-entry in the instant case. Respondant had just little more than arrived to commence his work when the injury was sustained. Even in Gulf Oil vs. Bivens, supra, there is a distinguishing element. In that case, the owner-occupier did not retain control of the premises and had no representative present at the sight of the work. It is an uncontrovered fact that Petitioner retained control of the premises and that a representative of the Petitioner was present at the time the injury was suffered by Respondant. In Turner vs. West Texas Utilities Company, 290 F2nd 191, (cited by the Court), the dangerous condition that the Court was concerned with in that case was not located on the premises of the owner-occupier and the owner-occupier had no control whatsoever over

the dangerous condition complained of. There can be no question about the dangerous condition, not only being within the premises of this Petitioner, but furthermore the control over the dangerous condition was absolutely in the Petitioner.

In the Strom vs. New York Telephone Company, 200 NE 659, the Court in reciting the facts of this case clearly indicates the distinguishing factor, and in that case, the Defendant has no control of or the details of the work. A representative of the Defendant owner-occupier went to the location and specifically warned the immediate supervisor and foreman of the injured employee. Further this same representative specifically warned the District Superintendent of the dangerous condition. The Court in its opinion characterizes the injured employee as " . . . an employee . . . of one who is a lessee of the rights and property in and upon the pole and whose acts helped to create the very situation out of which the accident occured." Respondant was not an employee of a lessee of the premises upon which the work was to be conducted. No representative of the Petitioner gave such warnings of danger to Respondant's employer. Respondant's employer was not using the premises or the facilities in the conduct of this business. The differences in the Storm Case and the instant case are abundantly clear and again point out the falacy of a generalization of the duty owed and satisfaction thereof in cases of owner-occupier independent contractor's employee.

In Schwarz vs. General Electric Realty Corporation, 126 NE2nd 906, the Defendant had no control over the dangerous condition that existed. Furthermore, the facts were established in this case that the proximate cause of the injury was the negligence of the employer of the injured employee. Furthermore, the Court declares. . . "It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractors. It was the independent contractors and not the owner's operation and it was entirely under the supervision and control of the former." In the instant case, no one has ventured the proposition that Respondant's employer had control over the premises housing the dangerous condition. The findings of the Trial Court Jury that the proximate cause of the injury was the actions or actually the lack of actions by the Petitioner, owner-occupier, cannot be ignored. It is also clear that the operations being conducted were for the benefit of the Petitioner and being performed at the place that Petitioner dictated. Respondant would again point out that under Rule 274, Texas Rules of Civil Procedure, the questions for the Supreme Court are only questions of law and the Court is required to construe the facts as established in the Trial Court or the inferences therefrom most favorably in support of the judgment there rendered.

Respondant would respectfully submit to the Court that the above reasoning and indicated distinguishing characteristics of the cases

cited in support of its decision, point clearly to the fact that the Court has erred in overruling the Reinle decision in such summary fashion, and in so doing has opened a Pandora's Box for generalizations where generalizations cannot exist. Therefore, Respondant respectfully request the Court to reconsider its opinion in a rehearing and that upon such rehearing, the Court affirm the Trial Court and Court of Civil Appeals.

THIRD POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 503, Texas Rules of Civil Procedure, which requires the Court to remand Respondant's case for a new trial.

ARGUMENT UNDER THIRD POINT OF ERROR

Rule 503, Texas Rules of Civil Procedure, provides that the Supreme Court may remand a case for another trial, if the error law "amounted to such a denial of the rights of the Petitioner (Respondant in the instant case) as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case or was such as probably prevented Petitioner (Respondant in the instant case) from making a proper presentation of his case to the Appellate Court." The second paragraph, Rule 503, is inapplicable since the error was not committed by either the Trial Court or the Court of Civil Appeals, but originated in the Supreme Court by its own declaration in the Reinle Case. Although the rule speaks specifically to errors committed by the Lower Courts, the rule in its underlying purpose is designed to prevent an error from dictating an incorrect judgment and to provide the parties to

the lawsuit with the opportunity to present their case properly. The errors admittedly committed by the Supreme Court in the Reinle Case and which it seeks to correct by its opinion in the instant case has without question prevented the Respondant from presenting his cause of action properly and at least, insofar as the Supreme Court has decided, resulted in the rendition of an improper judgment. This is no less error than any error that could be committed by the Lower Courts. As a practical matter this error is far more devastating to the Respondant's case, since both the Respondant and the Lower Courts considered, and rightfully so, the rule of law under which Respondant prepared and presented his case to be and it was at the time, the established rule of law. Therefore, Respondant respectfully requests that the Court recognize the purpose and intent of Rule 503, Texas Rules of Civil Procedure, and that the Court remand this case for a new trial under the newly announced rule of law.

FOURTH POINT OF ERROR

The Supreme Court erred in that by its decision Respondant has been denied due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution.

ARGUMENT UNDER FOURTH POINT OF ERROR

The Supreme Court has erred in overruling the Trial Court and the Court of Civil Appeals by announcing a rule of law which is diametricly opposed to the admitted controlling rule of law relied upon by Respondant in the Trial

Court and the Court of Civil Appeals and has thereby denied Respondant due process of law under the provisions of the Constitution of the State of Texas and the Fourteenth Amendment of the United States Constitution.

The Supreme Court has erred in rendering rather than remanding for new trial their opinion overruling the Trial Court and the Court of Civil Appeals and by such error has denied to Respondant due process of law under the provisions of the Constitution of the State of Texas and the Fourteenth Amendment of the United States Constitution.

Article 1, Section 19, Bill of Rights, Texas Constitution:

> Section 19, "Deprivation of life, liberty, etc; due course of law. Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land."

Respondant respectfully would show this Honorable Court that he has been denied due process of law by this Court. The Court, has in the instant opinion, declared a change in the rule of law which prevents Respondant's recovery for damages which he has suffered. In order to accomplish this result the Supreme Court was required to overrule an existing decision and rule of law, forty-three years on the books of this State. In the preparation of this case, Respondant was required to rely upon the controlling rule of law. Doing so, according to the procedural mandates of the State law, Respondant, confident of his position since that position was rooted in the decisions of the Supreme Court of the State, prepared and presented his case under that rule of law. In the final stage before the very Court which had

established the rule of law relied upon by the Respondant, that same Court changed the rule. Notice, the Court did not declare that the Respondant had relied upon the wrong rule of law, but that the rule of law relied upon was now to be changed.

"The term 'due process of law' is synonymous with ' the law of the land', its essential elements are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and it means a law which hears before it condemns, which proceeds on inquiry and which renders judgment only after trial." Masonic Grand Chapter of Order of Eastern Star vs. Sweatt, 329 SW2nd 834, Ref. n.r.e. There is no conceivable way that Respondant can be considered to have had notice that the law he relied upon was to be declared changed to directly oppose him. It all but goes without saying that the practical result of this decision is that Respondant was never given the opportunity to be heard. Furthermore, it must be abundantly clear that by this decision of the Supreme Court, the Respondant has been forced to prepare and present his cause of action and then be admonished as to what the rule of law was that he was subject to.

Although it might appear that Respondant has availed himself of the judicial system, it is evident that as a practical matter, Respondant has been denied, by this decision of the Supreme Court, the normal procedures afforded a litigant and thereby Respondant has been denied due process of law under both the Constitution of the State of Texas and the United States.

Constitution, Fourteenth Amendment. Respondant recognizes that "The reversal of a former decision to the prejudice of one of the parties or a departure by the Court(s) of the State from a rule of property established by prior decision(s) does not violate the guaranty", in and of itself. 12 American Jurisprudence, #577 p. 273, Constitutional Law. However, the article goes on to say, "If there has been a full hearing or opportunity for hearing, . . . "It is Respondant's position that such full hearing has been denied him. Consider further in 12 American Jurisprudence, #622, Right to Prove and Recover Damages. "It has been said that due process of law guarantees an orderly procedure in Court for the ascertainment of damages for an injury to the end that the person injured shall have a proper and adequate remedy." " . . . the Courts have treated the right to damages as a substantial one of which a person cannot be deprived except by due process of law." Here the Respondant is to be denied his recovery; and to be deprived of his right to recover the damages he has suffered. Respondant requests that the Court reconsider its opinion and that upon rehearing, affirm the Trial Court and the Court of Civil Appeals or remand this case for a new trial.

Without repeating the statement and argument in the above point of error the same position is advanced for the error committed by the Court in rendering rather than remanding this case for a new trial. Additionally, Respondant would respectfully point out that the Court by reversing and rendering the opinion rather than remanding has again denied Respondant due

process of law under both the United States and Texas Constitutions. If it is the considered wisdom of this Court that the rule of law announced in this case is to be the rule of law that controls, then Respondant is justly entitled to prepare and present his cause of action under such rule of law. This is not to say that had the Respondant relied upon an erronous rule of law he would be so entitled, but since by the Courts own admission, the rule relied upon was the law at the time this case was prepared and presented, but has now been changed, then the Respondant's right to prosecute his cause of action under that rule has been denied and thereby Respondant has been denied due process of law.

Again, respectfully, Respondant requests this Honorable Court to grant this motion for rehearing and that upon such rehearing that the Court remand the case for a new trial under the rule of law announced in this opinion.

CONCLUSION

The owner-occupier, Petitioner, owed a duty to the employee of the independent contractor invitee to provide a safe place to work or to give warning of the existing dangeous condition to the employee. The Jury in the Trial Court determined that Petitioner-Defendant failed to provide a safe place for the employee-Respondant-Plaintiff to conduct his work. Rule 279, Texas Rules of Civil Procedure, requires that any unsubmitted issues that are required for recovery are to be deemed as found in support of the judgment. This Court has determined that the duty owed by the

owner-occupier to the employee can be satisfied by ". . . an adequate warning given to the employer . . . ." The correct issue that Respondent failed to submit, as a result of the Supreme Court's decision was whether or not the employer of Respondent-employee had received adequate warning from the Petitioner. This opinion does not change the undisputed fact that no issue on this point was submitted. Rule 279, Texas Rules of Civil Procedure, remains the same. This writer submits that if the Court has determined that adequate warning to the employer will satisfy the duty to provide a safe place in which to work or to warn of the dangerous condition, that regardless of this conclusion, the judgment in this case must be affirmed under the provisions of Rule 279, Texas Rules of Civil Procedure.

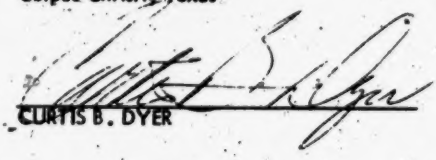
Respondent, as a result of the Court's rendered decision, has been denied the opportunity to prepare and present his cause of action fully and as a result of this, has been denied the constitutionally guaranteed due process of law.

WHEREFORE, PREMISES CONSIDERED, Respondent prays this Honorable Court to grant this Motion for Rehearing and that upon such rehearing, the Court affirm the Trial Court and Court of Civil Appeals. In the alternative Respondant prays the Court to remand this case for new trial according to the dictates of this Court.

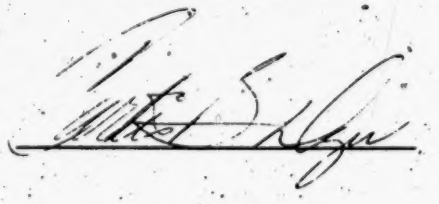
Respectfully submitted,

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By 
CURTIS B. DYER

I hereby certify that a true copy of the foregoing Motion for Rehearing was served on Mr. James C. Watson, Keys, Russell, Watson & Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorney for Petitioner, by mailing the same to his office by United States Certified Mail on the 14th day of June, 1967.



Rule 279, Texas Rules of Civil Proceedure, Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or reqested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

(Emphasis added)

Rule 503, Texas Rules of Civil Proceedure, May Remand

If the judgment of a Court of Civil Appeals shall be reversed, the Supreme Court may remand the case either to the Court of Civil Appeals from which it came or to the district court for another trial.

Provided, first, that no judgment shall be reversed on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the petitioner from making a proper presentation of his case to the appellate courts; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal to act, by either the trial judge or any judge or official employee of the Court of Civil Appeals, shall prevent the proper presentation of a cause to the Supreme Court, and be such as may be corrected by the judge or official below, then the judgment shall not be reversed for such error, but the

Supreme Court will direct the said judge or official to correct the error, and thereafter the Supreme Court will proceed as if such erroneous action or failure to act had not occurred.

Amended by order of March 31, 1941.

(Emphasis added)

Rule 1, Texas Rules of Civil Procedure, Objective of Rules

The proper objectives of rules of civil procedure is [are] to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least espense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

(Emphasis added)

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No. 720

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

WILL RAY HENRY,
Petitioner,

vs.

DELHI-TAYLOR OIL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR DELHI-TAYLOR OIL CORPORATION IN OPPOSITION

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IN THE

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OCTOBER TERM, 1967

WILL RAY HENRY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR DELHI-TAYLOR OIL CORPORATION IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Texas (Pet. App. A, 1-6) is reported at 416 S.W.2d 390; however, the date of the overruling of the Motion for Rehearing was erroneously reported as July 14, 1967, instead of the correct date of July 12, 1967.

JURISDICTION

The Supreme Court of Texas delivered its opinion on May 31, 1967, and Petitioner's Motion for Rehearing was denied on July 12, 1967. (See Appendix "A", the notification from the Clerk of the Supreme Court of Texas) In attempting to invoke the jurisdiction of this Court under 28 U.S.C., § 1257(3) (1949), the Petitioner has failed to comply with the requirements of timely filing imposed by 28 U.S.C., § 2101(c) (1958).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas in construing and applying its own rules of civil procedure has deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution.

2. Whether a decision of the Supreme Court of Texas which merely confirms existing state law as it had been announced by intermediate appellate courts whose opinions had been subjected to review by the Supreme Court, has deprived Petitioner of a right to a "hearing" as guaranteed under the Fourteenth Amendment to the United States Constitution, when the Supreme Court expressly overruled an old opinion that had already been impliedly overruled.

ARGUMENT

1. Writ of certiorari should be denied because the petition was not filed with the Clerk of this Court within the time prescribed by law.

A petition for writ of certiorari, intending to bring a judgment in a state court civil action before the Supreme Court for review, must be filed within ninety days after the entry of such judgment. 28 U.S.C., § 2101(c) (1958). In the instant suit, Petitioner's Motion for Rehearing was denied by the Supreme Court of Texas on July 12, 1967, as evidenced by the notification sent by the Clerk of the Supreme Court of Texas to all attorneys of record (see Appendix "A"). The publisher of the Southwestern Reporter incorrectly printed the date when reporting the opinion of the Supreme Court of Texas (416 S.W.2d 390). The petition for writ of certiorari was filed on October 12, 1967. The intervening period of time between these two dates is ninety-two days.

A review of the decisions of this Court in applying 28 U.S.C., § 2101(c) (1958) (formerly 28 U.S.C., § 350 (1940)) discloses that the prescribed time period for filing is jurisdictional. *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412 (1943); *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952); *United States* v. *Adams*, 383 U.S. 39 (1966). The policy involved in this statutory limitation on the Supreme Court's jurisdiction was discussed by the Court in *Matton Steamboat Co.* v. *Murphy*, supra, when in considering the timeliness of an appeal it stated (319 U.S. 412, 415):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litiga-

> tion shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

In *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, supra, 344 U.S. 206, 213, which was a suit involving a writ of certiorari, the Court recognized this limitation on its jurisdiction when it stated:

> ". . . we do mean to encourage applicants to this court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period."

Respondent recognizes that the period of time for filing a petition for writ of certiorari may be extended, for good cause shown, as provided in 28 U.S.C., § 2101(c) (1958) and Rules 22, 34 and 50 of the Rules of the Supreme Court of the United States. Respondent has not been notified by Petitioner of any request for extension of time to file his petition for writ of certiorari. If Petitioner has in fact filed for an extension of time, it is submitted that Petitioner has failed to comply with the requirements of the aforementioned Rules, inasmuch as Respondent has never been notified of such an application or any action taken with regard to such application. Furthermore, Respondent has not been informed of any extension of time for applying for a writ of certiorari being granted by a justice of the Supreme Court within the ninety-day period following the denial of Petitioner's Motion for Rehearing by the Supreme Court of Texas.

Since Petitioner has failed to comply with the established statutory provisions and court rules governing the

filing and docketing of petitions for writ of certiorari, it is Respondent's contention that this Honorable Court is without jurisdiction to grant the requested writ.

2. The Supreme Court of Texas has merely construed and applied its own Rules of Civil Procedure.

Respondent contends that there is not any special or important reason alleged by Petitioner why this Court should grant a review on writ of certiorari. The Texas Supreme Court in its opinion has not decided any federal question; rather, it has merely interpreted its own rules of civil procedure and the case law of its own jurisdiction in a manner contrary to Petitioner's desires. Furthermore, Respondent contends that Petitioner has not been deprived of due process of law as provided for in the Fourteenth Amendment of the United States Constitution.

In order to discuss sensibly the Petitioner's assertion that the Texas Supreme Court did not properly apply Rule 279, Texas Rules of Civil Procedure, it is necessary, initially, to determine which of the parties in the instant litigation had the burden of submitting and obtaining a favorable jury finding on Respondent's failure to warn or to give adequate warning under the circumstances. Only upon resolving this question will it be possible to discuss intelligibly the application of Rule 279 in relation to Petitioner's application for writ of certiorari.

It is well-settled law in this state that in a suit by an invitee against an occupier of land:

> ". . ., the invitee must not only prove that he was injured as a proximate result of encountering a condition on the premises involving an unreasonable risk of harm, *but he must also prove, as a part of the*

plaintiff's case, that the occupier owed him a duty to take reasonable precautions to warn him or protect him from such danger, i.e., the plaintiff must negative 'no duty'." (Emphasis added). *Halepeska* v. *Callihan Interests, Inc.*, 371 S.W.2d 368, 378 (Tex. Sup. 1963).

Likewise, in a later case involving the duty that an occupier of premises owes to an invitee, the Texas Supreme Court said, "it was incumbent upon plaintiff to have requested issues to negative the adequacy of the warning, if this was his position." *Western Auto Supply Co.* v. *Campbell*, 373 S.W.2d 735 (Tex. Sup. 1963).

A review of the record in the instant case discloses that this case was filed in the trial court on July 15, 1961; on July 1, 1963, Respondent filed its First Amended Original Answer, which constituted its trial pleadings for the first trial that started on November 12, 1963 (resulting in a hung jury) and for the second trial which started June 1, 1964, from which this case was appealed. In that pleading, Respondent pleaded that it breached no duty owing to Petitioner. Petitioner failed to request any issues concerning the warning or the adequacy of the warning which Respondent gave to Petitioner's employer, even though Respondent pleaded "no duty" and uncontroverted evidence was presented to show that such a warning had been given. Respondent's Motion for Instructed Verdict and Motion for Judgment Non Obstante Veredicto in the second trial of this case, as well as Respondent's Motion for Judgment Non Obstante Veredicto in the first trial and the trial brief in support thereof, are set forth as appendices for the Court's convenience. (See Appendices "B"-"E"). A review of paragraph II of each of these motions (see Appendices "B", "D" and "E") discloses that the question of warning and the adequacy of the warning

given was unquestionably presented at the earliest level of this proceeding.

It is Respondent's contention, as the Supreme Court of Texas found, that:

> ". . . the evidence establishes conclusively that the dangerous condition on the premises which resulted in injury to Henry was, in the light of the warning given, as well known to Vickers (Petitioner's employer) and his superintendent-foreman, Bernie B. Smith, as it was to Delhi-Taylor." 416 S.W.2d 390, 393 (Tex. Sup. 1967).

If, as Petitioner contends, there was a fact issue presented with regard to the warning given (Pet. App. 3-4), the duty was upon Petitioner to request jury issues on this independent ground; and in the absence of his so doing, the issue is deemed waived as provided in Rule 279, Texas Rules of Civil Procedure.

An understanding of Rule 279 cannot be obtained by paraphrasing the language of the rule in such a manner as to denude the rule of its meaning (Pet. App. 5). For the Court's convenience, the second paragraph of the rule is set forth in its entirety:

> "Rule 279. Submission of Issues.
>
> * * *
>
> "*Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived;* but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and

there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party." (Emphasis added).

It is elementary that a party upon whom the burden rests to establish something in evidence must plead, introduce evidence and obtain a favorable jury finding (or it must be conclusively established by the evidence).

As has been outlined previously, in Texas, the injured party has the duty to prove either no warning or inadequate warning. *Halepeska* v. *Callihan Interests, Inc.*, supra; *Western Auto Supply* v. *Campbell*, supra.

Inasmuch as Petitioner has failed to plead, introduce evidence or request issues in relation to the question of no warning or adequacy of warning, it will be necessary to review the applicable portions of Rule 279, Texas Rules of Civil Procedure, in detail.

The first sentence of the second paragraph of Rule 279, supra, clearly states that if a fact issue arises during the course of the trial concerning an independent ground of recovery or of defense, and no issue is given or requested, the issue upon appeal is deemed waived. The Rule then continues with the portion of the Rule which Petitioner has paraphrased and attempts to rely upon; when copied correctly, it reads:

". . ., but where *such* [not *a*] ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment." (Emphasis and portion in brackets supplied).

Initially, it is readily apparent that "such ground of recovery or of defense" relates to the "independent ground of recovery or defense" contained in the first clause of the paragraph. Thus, in order for the portion of the paragraph upon which Petitioner attempts to rely to be applicable, the following things must be present:

1. The independent ground of recovery or defense must consist of more than one issue;

2. At least one or more of the issues necessary to sustain the independent ground of recovery or defense must be submitted to and answered by the jury;

3. One or more of the issues necessary to sustain the independent ground of recovery or defense must be omitted (i.e., not submitted to or answered by the jury) without request or objection; and

4. There must be evidence to support a finding on the issue or issues which are necessary to sustain the independent ground of recovery or defense *and* which has (or have) been omitted.

If all of the foregoing requirements have been met, and then the trial court does not make any written findings on the omitted issue or issues, the omitted issue or issues then are to be deemed found in a manner to support the judgment. The appellate court has no power to find contrary to the partial findings made by the jury on submitted issues which constitute a portion of the independent ground of recovery or defense.

For a comprehensive discussion of omitted issues and presumed findings, see *Vernon's Annotated Texas Rules of Civil Procedure* following Rule 279 (Dooley, "Commentary on Submission of Special Issues"). The interpretative comment states:

> "It was not the intention of the committee to make any change in the rule, but merely to announce it as it had been formulated by the Court. Under this rule, if a ground of recovery or of defense is wholly ignored or neglected, and no issue is submitted or requested thereon, it will be held to have been waived and no recovery or defense can be based thereon. If, however, the grounds of recovery or defense consist of more than one element—that is, require more than one issue to submit them—and the court submits some of the elements but omits others, and there is no objection to the failure to submit same, the parties will be placed in the position of having agreed to waive a jury trial on the unsubmitted elements and to have submitted them to the court for his determination. Either party, after notice and before final judgment is rendered, may request the court to make an express finding on such issues. In such an event the judge may find as he thinks the evidence justifies. If he does not make such finding, then, on appeal, it will be presumed that the court found on such unsubmitted elements in such manner as to support the judgment."

The interpretative comment further states:

> "The usual example used in discussing the subject of presumed findings is the series of questions involved in an ordinary negligence case. These questions are: (1) whether the defendant did the act, or suffered the omission alleged; and (2) whether such act or omission, if found, was negligence; and (3) whether such negligence, if any, was the proximate cause of injuries to the plaintiff. These are interdependent and kindred issues in a proper sense. They deal with the same subject, that is, the alleged act or omission. The first relates to the existence of the subject, and if there is an affirmative finding, then the second determines the quality of the subject, and the third determines the causal consequences of the subject. The submission of any one of said issues is a partial submission of the whole inquiry covered by the three affiliated issues. The submission of any one of said issues ought to bring any unsubmitted issue of the group within the provision for presumed findings."

Thus, it is apparent that unless at least one issue of a whole inquiry is submitted or requested, the presumed (or deemed) findings portion of Rule 279 cannot come into play.

Yet, Petitioner, although admitting in his Petition for Writ of Certiorari that no issue was submitted or requested with regard to the warning given Petitioner's employer (Pet. App. 3-4), urges that this Court, in obvious contravention of the requirements of Rule 279, hold that the unsubmitted issue of warning be deemed found in support of the judgment. Only through a complete misinterpretation of the provisions of the rule could such a result be reached.

Petitioner, in attempting to justify his failure to plead, prove and request an issue to negative the warning given to Petitioner's employer, contends that the preparation and presentation of this cause of action, the submission of special issues to the jury and the appeal of this case were based on what he refers to as previously well-settled law, i.e., *Galveston Houston Electric Ry. Company* v. *Reinle,* 113 Tex. 456, 258 S.W. 803 (1924), which is erroneously cited by Petitioner as 258 S.W.2d 803 (Pet. App. 5).

This contention is novel in two respects. First, during oral argument before the Supreme Court of Texas on December 7, 1966, the Court requested comment on that case inasmuch as the case had not been briefed or referred to the Court's attention in any manner by the Petitioner. (See Appendix "F"). Due to this fact, briefs were filed after oral argument discussing the applicability of this supposedly "well-settled law". The other novel aspect of Petitioner's contention is the fact that both the state courts and the federal courts, in applying Texas law, had negatived and tacitly overruled the *Reinle* decision. *Tyler* v. *McDaniel,* 386 S.W.2d 552 (Dallas Civ. App., 1965, err. ref'd., no reversible error); *Gulf Oil Corp.* v. *Bivins,* 276 F.2d 753 (5 CA, 1960, cert. den. 364 U.S. 835, 81 S.Ct. 70, 5 L.Ed.2d 61); *Turner* v. *West Texas Utilities Co.,* 290 F.2d 191 (5 CA, 1961); *Nance Exploration Co.* v. *Texas Employers Ins. Assn.,* 305 S.W.2d 621 (El Paso Civ. App., err. ref'd., no reversible error, cert. den. 358 U.S. 908, 79 S.Ct. 235, 3 L.Ed.2d 229); *Texas Electric Service Co.* v. *Holt,* 249 S.W.2d 662 (Ft. Worth, Civ. App., 1952, err. ref'd., no reversible error).

In the most recent opinion delivered by a Texas court, prior to the opinion by the Texas Supreme Court in this

suit, the Dallas Court of Civil Appeals reviewed the "well-settled law" that Petitioner purportedly based his case upon in the following language:

> "It is apparently the law in Texas that an owner or occupier of property is under a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of hidden or inherent dangers on or in that property, and that such duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger. That is the unequivocal holding of the United States Court of Appeals, in Gulf Oil Corp. v. Bivins, 5 Cir., 1960, 276 F.2d 753, 758, cert. den. 364 U.S. 835, 81 S.Ct. 70, 5 L.Ed.2d 61, followed by the same court in Turner v. West Texas Utilities Co., 290 F.2d 191.
>
> "The Texas authorities on this point are few and not entirely harmonious. It had been held in Proctor v. San Antonio Street Railway Co., 1901, 26 Tex. Civ. App. 148, 62 S.W. 938, 939, wr. ref., that the independent contractor owed the duty to warn his employee, but that no such duty rested upon the owner. The Supreme Court in 1924, answering certified questions, announced a contrary rule in Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803, 806. However, we do not find this Reinle case cited in support of this particular holding a single time in the more than forty years since its publication. The duty of an owner or occupier of premises to warn the servant of an independent contractor of hidden or inherent dangers was recognized in Smith v. Henger (1950), 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853, and Roosth & Genecov Production Co. v. White (1953), 152 Tex. 619, 262 S.W.2d 99, but the exact question now before us was not decided in either of those cases. They were followed by Nance Exploration Co. v. Texas Employers' Ins. Ass'n. (1957), Tex. Civ. App., 305 S.W.2d 621, wr. ref. n.r.e., cert.

den. Flowers v. Nance Exploration Co., 358 U.S. 908, 79 S.Ct. 235, 3 L.Ed.2d 229, which involved facts quite similar to those of this case. It was held unequivocally that, since the injured workmen's superiors knew of the danger, he must be held to have also had knowledge of it.

"We are quite well persuaded that, in principle, at least, the rule of Bivins and Nance Exploration Company is correct. To hold that an owner or general contractor must warn each individual workman employed by a subcontractor of hidden or inherent dangers in the property, even though those in charge of the work for the subcontractor have full knowledge of such dangers, in our opinion, 'would result in imposing a standard of duty exceeding reasonable bounds.' Storm v. New York Telephone Co., 270 N. Y. 103, 200 N.E. 659, 662.

"It appears without controversy that Tyler's employer E. H. Roberds was thoroughly familiar with the premises, the overhead high lines and all of the dangers thereof. We therefore hold that this knowledge of Roberds was sufficient to discharge any duty resting upon appellees to warn Tyler.

"Appellant contends that there was a 'double duty' resting upon appellees; i.e., a duty not only to take such precautions as a reasonably prudent person would take to protect his invitees from dangers which are not open and obvious, but also to warn them thereof. As we understand this position, it is in practical effect that appellees owed Tyler the 'double duty' of having the electricity disconnected and of warning him that it had not been disconnected. We are unable to follow this reasoning. Performance of the first alleged duty would clearly eliminate the second, and performance of the second would obviate liability for non-performance of the first. That these are alternative, rather than double, duties is clearly held in Western Auto Supply Co. v. Campbell (Tex.

1963), 373 S.W.2d 735, 736, and announced in Restatement of the Law of Torts, Sec. 343."

Tyler v. *McDaniel*, 386 S.W.2d 522, 562-3 (Dallas Civ. App. 1965, writ ref'd.; no reversible error).

In light of this language, it is readily apparent that the opinion of the Supreme Court of Texas merely expressly overruled an old opinion which had long before been negatived by all of the courts deciding the question of whether an adequate warning given by the owner or occupier of land to the independent contractor employed to perform work on his premises is sufficient to discharge the landowner's duty to warn the employees.

Inasmuch as the Texas Supreme Court correctly interpreted and applied its own Rules of Civil Procedure and merely affirmed the state of the law governing the type of fact situation as it had existed for a number of years prior to the instant suit, it is inconceivable that one could contend that the due process of law provisions of the Fourteenth Amendment to the United States Constitution have been violated.

3. The Supreme Court of Texas merely re-stated existing law and expressly overruled its prior decision which had already been impliedly overruled.

Petitioner contends in his second point of error that the action of the Texas Supreme Court has as a practical matter and as a matter of fact denied Petitioner the right to be heard at all (Pet. App. 7). Needless to say, this contention is rather unique since the Petitioner twice had the opportunity to be heard at the trial court level; this case was fully tried on two occasions in the district court; the first trial was a hung jury (10-1 against Petitioner), and this appeal is from the second trial; furthermore,

Petitioner has had his "day in court" at both the intermediate and final state appellate court levels.

In an effort to extenuate the fact that Petitioner failed to plead, prove or request issues with regard to the warning given, Petitioner now asserts that the Texas Supreme Court by reversing the judgments of the trial court and the intermediate court of civil appeals has denied Petitioner an opportunity for a hearing (Pet. App. 4, 7).

This Court has long recognized that the concept of procedural due process of law in the adjudication of a person's claims by the courts of his own state is not a matter of concern for the Supreme Court so long as the determination by the state courts is in accordance with its own conception of policy and fairness and the decision does not offend some fundamental principle of justice. 16 Am. Jur. 2d, "Constitutional Law", Sec. 549 (1964).

Petitioner is here contending that he has been deprived of the fundamental right of an opportunity for a hearing. If Petitioner has not received a hearing, as he contends, it is merely because Petitioner was silent.

A review of the opinions in this suit by both the Supreme Court of Texas and of the Court of Civil Appeals (Pet. App. A, 3-4 and 13) discloses that both of these courts were aware of the fact that the question of warning was in the case, yet Petitioner contends that he has not been provided a hearing or opportunity for hearing on this matter.

Obviously, due process requires that a party shall have the right to raise such issues as he may have in a cause. 16 Am. Jur. 2d, "Constitutional Law", § 574 (1964). Petitioner contends that he should have another oppor-

tunity for a hearing because he failed to develop evidence on the question of warning to his employer (Pet. App. 7). He then asserts that this failure was justified because he had relied on the decision in *Galveston-Houston Electric Ry. Co.* v. *Reinle*, supra. As has been pointed out previously, this decision had been negatived and tacitly overruled long before the instant litigation ensued.

Petitioner's attempt to justify his failure to develop evidence on the question of warning is not well taken because as this Court stated in *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548 (1945):

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

Furthermore, should it be determined that the Supreme Court of Texas, in deciding this case, has overruled "well-settled law" on the question of warning to employees of independent contractors, Respondent contends that the Fourteenth Amendment's guaranty of due process has not been violated, and, consequently, writ of certiorari should not be granted.

Although Petitioner contends he should be accorded a trial on the issue of warning or inadequate warning, he does not indicate the source of any evidence that would militate in any way against the undisputed evidence in this record. Roy Vickers (the owner of Roy Vickers Lease Service, Petitioner's employer) and Bernie B. Smith, superintendent and the only supervisory personnel on the job where Petitioner was injured, both admitted that they were fully warned as to the pressure in the pipelines and un-

derstood what the warning meant. There could be no other person with Roy Vickers Lease Service who could refute this testimony; certainly Petitioner has not indicated how he proposes to refute it.

Another trial of this case would have precisely the same result: a judgment as a matter of law that warning was received and understood by Petitioner's employer, and such warning discharged any duty to Petitioner owing by Respondent.

In a recent decision by this Court [*Linkletter* v. *Walker*, 381 U.S. 618 (1965)], the retroactive operation of an overruling decision was discussed, and following an historical outline of the development of the law on this topic, the Court held that "the Constitution neither prohibits nor requires retrospective effect" of a decision. In so doing, the Court stated (p. 629):

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

The Court in announcing these principles relied on the earlier decision of *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), which had decided that the highest court of a state in overruling a decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether a new decision is to apply prospectively only or also to past transactions.

A recent annotation has treated the question whether an overruling decision should be given retroactive effect

or should operate prospectively only. 10 A.L.R.3d 1371 (1966). In considering the constitutional limitations in this area it was stated at pages 1391-1392:

> "At various times, contentions have been made that it not only is permissible, but also is required by constitutional provisions, that an overruling decision be denied retroactive effect. Such contentions have been based, for example, on the grounds that the retroactive application of an overruling decision would constitute an impairment of contract obligations - - -, *or a denial of due process*, or a denial of equal protection of the laws (Emphasis added).
>
> * * *
>
> "On the basis of the more recent decisions it now appears generally established that the retroactive application of an overruling decision is not prohibited by any constitutional provisions, and, specifically, that such retroactivity does not constitute an impairment of contract obligations - - -, *or a denial of due process*, or a denial of equal protection of the laws." (Emphasis added).

In the annotation (pages 1399-1401), numerous cases are discussed in which previous decisions have been overruled and the Court has applied its new rule to the matters at issue in the instant case.

In reliance on the foregoing authorities, Respondent contends that Petitioner's argument that the Due Process clause of the Fourteenth Amendment requires another trial is without foundation. As Judge Cardozo said in the *Great Northern R. Co.* case, supra, and as reiterated in the *Linkletter* decision, supra, "We think the Federal Constitution has no voice upon the subject" (as to whether the Texas Supreme Court can apply its decision retroactively or prospectively).

WHEREFORE, Respondent prays the Honorable Supreme Court to deny the petition for writ of certiorari.

Respectfully submitted,

.....

WILLIAM H. KEYS
KEYS, RUSSELL, WATSON & SEAMAN
Attorneys for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing brief has been served on Messrs. Hubert L. Stone, Jr., and Curtis B. Dyer, Attorneys for Petitioner, by United States first-class mail to their office, 902 State National Building, Corpus Christi, Texas, on the ..... day of November, 1967.

.....

WILLIAM H. KEYS

APPENDIX "A"

CLERK'S OFFICE - SUPREME COURT
Austin, Texas, July 12, 1967

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of DELHI TAYLOR OIL CORPN. v. HENRY, A-11582, was this day overruled.

Very truly yours,

Garson R. Jackson, Clerk

APPENDIX "B"

[Filed November 26, 1963]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Judgment Non Obstante Veredicto

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and moves the Court to enter judgment for Defendant that Plaintiff take nothing notwithstanding the verdict of the jury, for the following grounds and reasons:

I

There were no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly showed that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, take nothing against Defendant, Dehli-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

APPENDIX "C"

[Filed November 27, 1963]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Trial Brief in Support of Motions for Judgment

TO THE HONORABLE JUDGE OF SAID COURT:

SUBJECT INDEX

I. Defendant Owed No Duty to the Plaintiff Under the Circumstances Except to Warn Him of Pressure in the Lines, And This Duty Was Discharged By Warning Given to His Employer.

II. The Work to be Done Was Not Intrinsically Dangerous; In Fact, All the Evidence Showed That a Dragline Could Safely be Used to Uncover "Loaded" Pipe Lines, If Ordinary Care Was Exercised in the Operation of the Dragline.

A. All the Evidence Showed That It Was Customary Usage in Work on Pipe Lines For a Dragline to be Used to Uncover the Same, Even When "Loaded" And There Was No Evidence Showing That It Was Improper to Use a Dragline For This Purpose.

B. It Was Not Reasonably Foreseeable That Injury Would Result to the Plaintiff From the Use of the Dragline to Uncover the Toluene Line.

(1) Defendant Was Not Required to Anticipate Negligent Conduct on the Part of the Dragline Operator.

(2) The Act of the Dragline Operator Constituted a New and Independent Cause of the Injuries to Plaintiff.

(3) The Pressure in the Lines and the Direction to Use a Dragline Constituted a Remote Cause And a Condition Only And Was Not a Cause in Fact.

III. It Was Not the Nature of the Work to be Done, But the Manner of Performance That Caused the Injuries to the Plaintiff, And, Since Roy Vickers Was an Independent Contractor, No Liability Could Be Imposed on Defendant For the Negligence on the Part of the Dragline Operator.

IV. The Opinion Testimony of the Plaintiff Constituted a Conclusion And Opinion For Which No Predicate Had Been Laid.

A. Whether It Was Safe For a Dragline to be Used Was Not a Subject for Expert Testimony.

B. The Plaintiff Did Not Qualify As an Expert to Express a Conclusion And Opinion.

BRIEF OF ARGUMENT

I. Defendant Owed No Duty to the Plaintiff Under the Circumstances Except to Warn Him of Pressure in the Lines, And This Duty Was Discharged By Warning Given to His Employer.

The evidence was undisputed and uncontradicted that Delhi-Taylor had warned Roy Vickers and Bernie Smith that the pipe lines over which the work was to be done by Roy Vickers Lease Service were dock lines that would continually be used and that all lines should be considered as though they were "loaded", which clearly meant that the lines would be carrying flammable materials. It was not necessary to warn the plaintiff himself that the

lines were loaded, as the notice to his employer satisfied the duty in that regard. *Gulf Oil Corporation* v. *Bivins*, (5 C.A., 1960) 276 F.2d 753, 758.

Furthermore, there was no duty on the part of Delhi-Taylor to protect the plaintiff against negligence of the dragline operator; this principle was well stated in *Texas Electric Service Co.* v. *Holt*, (Fort Worth, 1952, n.r.e.) 249 S.W.2d 662, 668:

> "It has also been held that an employer or the contractee does not owe a duty to exercise ordinary care *to protect servants or employees of a contractor from risk arising from the negligence of said contractor or a fellow employee.* See cases cited in Humble Oil & Refining Co. v. Bell, Tex. Civ. App., 180 S.W.2d 970, at page 976." (Emphasis supplied).

II. The Work to be Done Was Not Intrinsically Dangerous; In Fact, All the Evidence Showed That a Dragline Could Safely be Used to Uncover "Loaded" Pipe Lines, If Ordinary Care Was Exercised in the Operation of the Dragline.

A. All the Evidence Showed That It Was Customary Usage in Work on Pipe Lines For a Dragline to be Used to Uncover the Same, Even When "Loaded" And There Was No Evidence Showing That It Was Improper to Use a Dragline For this Purpose.

All the evidence clearly showed that it was customary for the dragline to be used to uncover pipe lines, even where "loaded", and the evidence showed that draglines had safely been used around * * *.

APPENDIX "D"

[Filed June 8, 1964]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Instructed Verdict

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and after the evidence was closed moves the Court to instruct the jury to return a verdict for Defendant, or, alternatively, to withdraw the case from the jury, and to enter judgment for Defendant that Plaintiff take nothing, for the following grounds and reasons:

I

There are no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly shows that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, take nothing against Defendant, Delhi-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

The foregoing motion was duly and timely presented to me, and after consideration thereof, the same was overruled and denied.

Signed the 8th day of June, 1964.

/s/ Horace S. Young
District Judge

APPENDIX "E"

[Filed June 18, 1964]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Judgment Non Obstante Veredicto

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and moves the Court to enter judgment for Defendant that Plaintiff and Intervenor take nothing, notwithstanding the verdict of the jury, for the following grounds and reasons:

I

There were no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly showed that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, and Intervenor, Hartford Accident & Indemnity Company, take nothing against Defendant, Delhi-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

APPENDIX "F"

THE SUPREME COURT OF TEXAS
Capitol Station
Austin, Texas

78711

Robert W. Calvert
Chief Justice
Meade F. Griffin
Clyde E. Smith
Ruel C. Walker
James R. Norvell
Joe Greenhill
Robert W. Hamilton
Zollie Steakley
Jack Pope
Associate Justices

Geo. H. Templin
Clerk

December 7, 1966

Hon. James C. Watson
Attorney at Law
1806 Driscoll Building
Corpus Christi, Texas

Hon. Hubert L. Stone, Jr.
Attorney at Law
902 Corpus Christi State National Building
Corpus Christi, Texas

Re: No. A-11582

Delhi-Taylor Oil Corp. v. Will Ray Henry

Gentlemen:

The Supreme Court would like to have your comments on the case of Galveston-Houston Electric Ry. Co. v. Reinle, 258 S.W. 803, and its possible application in deciding the above case argued this morning.

Particular attention is called to the next to last paragraph on page 865.

Respectfully yours,

/s/ Geo. H. Templin
Geo. H. Templin
Clerk

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NO. 720

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SUPREME COURT OF THE UNITED STATES

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WILL RAY HENRY,

PETITIONER,

VS.

DELHI-TAYLOR OIL CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONER

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REPLY FOR WILL RAY HENRY TO RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Judgment of the Supreme Court of Texas is reported in 416 SW2nd 390.

JURISDICTION

The jurisdiction of the Supreme Court of the United

establishing that Delhi-Taylor had failed to take those reasonable precautions and such was negligence and a proximate cause of the injuries suffered by Petitioner.

No issues were requested by Petitioner in regard to adequate warning of the existance of this dangerous condition. Furthermore, no such issues were suggested or demanded by the Respondent-Defendant, Delhi-Taylor. Additionally, although provision is made in the Texas Rules of Civil Procedure, Rule 279, for either party to demand that the Trial Court make findings on unsubmitted Special Issues, no findings were requested by Petitioner nor demanded by the Respondent.

Therefore, at that point Petitioner had prevailed in establishing that Delhi-Taylor had breached its duty to Petitioner. The reason why the issue or issues on the question of adequate warning were not requested or findings requested or demanded by either party simply begs the question. Regardless of the reason, that portion of the theory of recovery was not submitted; such issues were not requested and no findings requested or found.

Under the provisions of the Texas Rules of Civil Procedure, Rule 279, just such a situation is comtemplated.

> "When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory

partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection ot such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issues or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Therefore under the abundantly clear provisions of the Texas Supreme Court's own Rules of Procedure, if the issue of warning to Petitioner's employer was necessary to complete the submission of Petitioner's theory of recovery and such issue was not submitted, as it clearly was not, then under the above provisions of Rule 279, that issue must be deemed as found in support of the judgment. Herein lies the error of the Texas Supreme Court which is the foundation of the denial of due process of law complained of by Petitioner in his Application for Writ of Certiorari.

Again Petitioner does not here complain of the Texas Supreme Court's decision to overrule the Reinle Case; nor is it Petitioner's complaint that the rule of law has been declared to be that an "adequate warning" to the employee's employer will satisfy the duty owed by the owner-occupier to the employee. It is Petitioner's singular complaint that in order to use this case as a vehicle to declare this change in the law, the Texas Supreme Court has been required to blatantly refuse to recognize and apply their very own established rule of procedure. Petitioner is well aware that this Court will not require any particular mode of procedure of the States, so long as the basic right to a hearing are made available, and Petitioner does not request this Court do so here. However, it is just as well established that this Court

will not condone the denial of any procedural safe guards that are established and held out to be the procedure that will be used. This is exactly what the Texas Supreme Court has done, refused to even recognize much less apply, its own rules of civil procedure. The Texas Supreme Court has, as a practical result, prohibited Petitioner from having his day in Court and thereby has denied Petitioner his right of due process of law.

The Galveston-Houston Electric Ry Co. vs. Reinle 113, Tex. 456, 258 SW2nd 803 (1924), decision, at the time the present case was tried, was the Texas Supreme Court's latest announcement that warning to the employer-independent-contractor or knowledge of the dangerous condition by the independent-contractor was not sufficient to satisfy the duty owed to the employee of the independent-contractor by the owner-occupier. Again, Petitioner does not challenge the Texas Supreme Court's authority to overrule prior decisions. However, since this was the highest court's most recent announcement on the point of law directly in point with the Petitioner's theory of recovery and since it was never contended that the employee himself was ever warned, how can it be required of the Petitioner that he anticipate that the high court will choose this particular fact situation to announce a diametrically opposite position to that which has stood for some forty years? It might well be

that good jurisprudence requires that Petitioner be required to obtain a jury finding that Delhi-Taylor breached its duty to warn which could be satisfied by adequate warning to the independent-contractor-employer, as announced in the Texas Supreme Court's decision, but there was no such requirement at the time the case was tried to the jury. The only possible question of warning that could have been required to be established was a direct warning to the employee. No one at any time ever plead or attempted to established that the employee himself was warned. To the contrary, by the high court's latest decision, directly on the question, it is clear that even if the employer was warned by the owner-occupier of the dangerous condition, this would not be sufficient to satisfy the duty to warn the employee. Galveston-Houston Electric Ry Co. vs. Reinle, id.

The Supreme Court, in order to accomplish what it has accomplished in this decision, was required to ignore and blatantly refuse to apply Rule 279, Texas Rules of Civil Procedure and furthermore to assume the position of a fact finding body when it declared that the "evidence conclusively establishes . . . that the duty was not breached." Rule 279, was discussed above.

How can a point, that the Court has just announced to be of such supreme importance be said to be "conclusively

established" when not one shread of evidence was developed on this specific point and further no issue or issues were requested nor findings made on this point? It is inconceivable to this writer how this attitude, displayed by the Texas Supreme Court, can be anything other than a denial of basic and fundemental jurisprudential thought processes that have clearly denied Petitioner the right to be heard and thus denied to him his right of due process of law.

Petitioner respectfully requests that his Application for Writ of Certiorari be granted.

2. REPLY TO RESPONDENT'S POSITION THAT PETITIONER HAS FAILED TO COMPLY WITH THE PROVISIONS OF 28 USC, ART. 2101 (C) IN THE FILING OF THIS PETITION FOR WRIT OF CERTIORARI.

Petitioner is well aware of the policy of this Court in regard to the time for filing an Application for Writ of Certiorari. If there was any doubt previously, there is none now. Furthermore, Petitioner confesses that he was in error in the calculation of the actual dates upon which the Application and accompanying instruments were required to be filed. It must be pointed out that within the erroneously appointed deadline, October 12, 1967, the Application and all other necessary papers were filed. Furthermore, the docket will reflect that prior to this erroneous deadline, Petitioner filed with the Court a Motion for Extension of Time within

which to file the Application. Contrary to what the Attorney for Respondent would have the Court believe, Respondent was notified that the request was going to be made and specifically requested that it not be indicated that he was agreeing to the request for extension of time but that he had no objection. The purpose for the request for extension of time was to insure that the Transcript of the proceedings in the Texas Supreme Court would have sufficient time to be transported by the mails and was requested at the suggestion of the Clerk of the Court for which Respondent is grateful. The Court's attention is respectfully directed to such Motion for the purpose of observing that even in that instrument Petitioner was under the mistaken impression that the filing deadline was October 12, 1967,

Subsequently it was brought to the Court's attention and to the petitioner's attention that the application had been filed beyond the 90 day time period. At this point Petitioner first became aware of the error in calculating the time period. The following is offered for the purpose of explanation and not excuse. The calculation of the 90 day period was figured from the date reported in the Southwestern Reporter, 416 390 SW2nd. The date therein indicated as the date when the Petitioner's Motion for Rehearing was denied by that Court. The date given there was July 14, 1967. In fact the action of the Supreme Court in denying that Motion for Rehearing was taken on

July 12, 1967. Using the July 14th date, the 90 day period for filing the Petitioner's Application for Writ of Certiorari, lapsed on October 12, 1967, and figuring from the July 12th date, the deadline was October 10, 1967.

Petitioner respectfully requests the Court take into consideration that within recent times there apparently has developed a narrow exception where the Court has disregarded the time limit prescribed for filing petition for certiorari. Petitioner does not seek to expand this exception, but would request the Court accept this petition as being within the existing exception.

In the case of Banks vs. California, 1966, 86, S. Ct. 622, 388 US 420, 15 L Ed 2nd 499, the petition for certiorari was not received until April 13th. The date upon which the petition was due to be filed was April 9th. Here the documents contained in the petition indicated that the petitioner had executed them on April 16th and the delay came between that date and the time when the petition was actually mailed. The Court granted certiorari and vacated the judgment below with direction for further proceedings.

Another similar case was Smith vs. Mississippi, 1963, 83 S. Ct. 1265, 373 US 238, 10 L Ed 2nd 321. In Arnold vs. North Carolina - 1964, 84 US 1038, 376 US 773, 12 L Ed 2nd 77, the petition was filed after the 90 day period had expired. There was no extension of time obtained nor even requested.

Furthermore, there was no excuse or extenuating circumstances offered by the Petitioner. Here the Court again determined to disregard the untimely filing and granted certiorari and vacated the judgment below. The Court's decision pointed out that the petition was ffled within the period of time it could have been extended even though such extension was not requested nor obtained.

The above cases of course are criminal matters. Nevertheless petitioner cites them in support of his request that the Court waive or disregard the late filing of his Petition for Certiorari. Petitioner's liberties and rights to his contitutional guarantees have no less been infringed upon by the fact that this is a civil matter instead of a criminal matter. There is no distinction made in the constitution of the United States which makes one guarantee more important than the others. To the contrary, when such rights are violated, as they so clearly have been in the instant case, it can make no difference what fundamental right has been denied, if fundamental and if denied then it must be corrected.

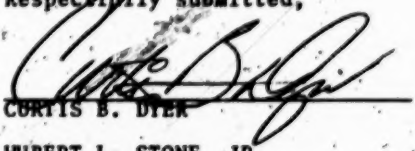
Recognizing the importance of the Court's policy in establishing deadlines, and the importance that at some point litigation must be ended, Petitioner respectfully and humbly implores the Court to disregard the technical error and consider the Application for Writ of Certiorari upon it's merits.

Furthermore that upon such consideration Petitioner's Application be in all things granted.

CONCLUSION

WHEREFORE, Petitioner respectfully prays the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



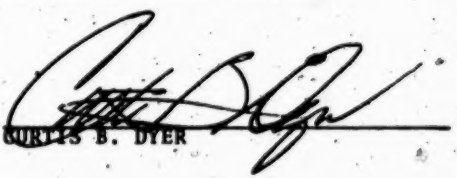
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

A copy of the foregoing brief, has been served on Mr. William H. Keys, Keys, Russell, Watson and Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorneys for Respondent.



CURTIS B. DYER

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OPINION BELOW

The judgment of the Supreme Court of Texas is reported in 416 SW2nd 390.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 USCA 1257 (3).

POINT PRESENTED

There is a controlling decision rendered by the Supreme Court of the United States which was not heretofore presented.

ARGUMENT

THERE IS A CONTROLLING DECISION RENDERED BY THE SUPREME COURT OF THE UNITED STATES WHICH WAS NOT HERETOFORE PRESENTED.

Petitioner recognizes that his petition has been fully considered and denied by this Court by Order dated December 18, 1967, but he respectfully petitions for rehearing on the ground that a controlling decision of this Court, of which he was unaware when he filed his Original Petition, is a substantial ground available to petitioner although not previously presented. The decision heretofore overlooked by Petitioner is Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 US 673, (1930). In an opinion by Justice Brandeis for a unanimous Court at 281 US 678 it was held that

> "The judgment of the Supreme Court of Missouri must be reversed, because it has denied to the Plaintiff due process of law . . . using that term in its primary sense of an opportunity to be heard and to defend its substantive right." (emphasis added)

The Court went to some length to recognize that it is for the State Court to decide questions of State law and then pin pointing the central question went on to state,

> "Our present concern is solely with the question whether the Plaintiff has been accorded due process in

> the primary sense - - - whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the State Court had the power to construe the Statute dealing with the State Tax Commission; to re-examine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But while it is for the State Supreme Courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (emphasis added) See also Bouie vs. City of Columbia 378 US 347, (1924).

Under this controlling decision, the Supreme Court of Texas has clearly denied Petitioner due process of law guaranteed under the Fourteenth Amendment to the United States Constitution.

When this case was tried and heard on appeal, the law of Texas, as authoritatively declared by the Texas Supreme Court in Galveston-Houston Elec. Ry. Co. vs. Reinle, 113 Tex. 456, 258 S.W. 803 (1924), was that an owner-occupier was required to give notice of a dangerous condition to an employee of an independent-contractor, and that notice to the employer was not enough. There was therefore no reason to present evidence, or request a special issue, on the extent of notice to the employer. (emphasis added) This rule was changed by the Texas Supreme Court in this case. That Court said, 416 SW2nd at 393:

> "Our holding here is diametrically opposed to the holding made in Galveston-Houston Elec. Ry. Co. vs. Reinle, 113 Tex. 456, 258 S.W. 803 (1924), and to hold as we do in this case, we must, and do, overrule that de-

> cision . . . There is no sound basis for distinguishing that care from the instant case. Reinle must either be followed or overruled."

It was entirely within the power of the Texas Supreme Court to abide by, or to overrule, the Reinle rule. But when the Texas Supreme Court went on to order judgment as a matter of law for defendant, on the ground that Petitioner's employer had had notice of the dangerous condition and that this now sufficed, it resolved against Petitioner an issue on which he had never been heard and on which no jury had passed. In doing so, the Texas Supreme Court denied Petitioner his day in Court. (emphasis added)

By a timely petition for rehearing Petitioner asserted in the State Court that its decision had denied him "due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution." When relief was refused him by the State Court, he came here asserting that the State Court had denied him "his 'hearing' guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution." Thus his attack on the action below as a denial of due process was raised at the first opportunity in the State Court and properly brought here.

In bringing that issue here, however, petitioner was unaware of the decision of this Court most closely related to what happened in the present action, and thus was unable to make a sufficiently persuasive showing that the State Court had decided a federal question of substance in a way probably not in accord with applicable decisions of this Court and thus that there are special and important reasons for this Court to exercise its discretion to hear this case. (emphasis added)

In the Brinkerhoff-Faris case the Missouri Court held that a Plaintiff was not entitled to equitable relief against an allegedly discriminatory tax assessment because it had not pursued its "adequate, certain, and complete" remedy of complaint with the tax commission. Six years earlier the State Court had held that the Tax Commission had no power to give relief in such circumstances, and that it would be "preposterous," "unthinkable," and "unconstitutional" to hold that the commission had such power. By petition for rehearing Plaintiff urged that the unforeseeable overruling of the earlier case transgressed the due process clause of the Fourteenth Amendment.

It is for Texas to decide, as it has done, that notice to the independent-contractor of a dangerous condition satisfies the duty of a landowner to employees of the independent-contractor. The Constitution of the United States, however, precludes Texas from announcing such a rule without giving petitioner opportunity to prove that he is entitled to recovery even under the new rule. (emphasis added) Perhaps he can make such proof to the satisfaction of a jury, Perhaps he cannot. The constitutional mandate is that he is entitled to try.

Plaintiff's cause of action is created by statute, Art. 8307 Sec. 6a. V.A.C.S., which incorporates the common law of the State of Texas by providing that

> "When the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may . . . proceed . . . at law against that person to recover damages . . ." Art. 8307 Sec. 6a, Vernon's Annotated Civil Statute."

Prior to the decision here complained of the incorporated common law that controlled this particular fact situation was to be found in the Reinle decision, 113 Tex. 456, 258 S.W. 803 (1924).

In the decision complained of the Texas Supreme Court admitted that the Court was required to overrule the Reinle decision in order to render the decision it did in the present case. Thus the rule of law which was made part of the statute was the Reinle decision which had stood for over Forty years as the Texas Supreme Court's final word on this rule of law. It was the state of the law prior to the time Petitioner was injured and all during the prosecution of his cause of action up to the Texas Supreme Court's decision.

Thousands of other injured parties have had the benefit of recoveries under this statute and the common law rule of the Reinle case incorporated there. Now, only after trial and appeal, the Texas Supreme Court decides that this claimant, Will Ray Henry, is not entitled to the rule of law that governed his cause of action made applicable to his circumstances through statute which incorporated within it the Reinle decision.

Petitioner at the time of his injury was subjected to a fact situation from which he cannot remove himself. The rule of law that governed this specific fact situation provided that the owner-occupier of land owed a duty to an employee of an independent-contractor to provide such employee with a safe place in which to work or to warn him of dangerous conditions that existed on such premises and that this duty could NOT be satisfied or discharged by the owner-occupier's warning to the employer-independent-contractor of this condition. Regardless of any developing trends away from this rule of law, this was the rule of law last announced by the

highest court in the State. Parties subjected to a given fact situation upon which the State's highest court has rendered its decision, must not only be bound by the rule of law but must also have access to that same rule of law for the protection of their rights and recovery for wrongs perpetuated upon them. To deny the same rule of law to the same or similar fact situations, as has been done by the Texas Supreme Court, is to openly deny due process of law. The denial of the same rule of law makes meaningless all trials and hearings that have preceded such denial. The Texas Supreme Court by its decision in this case has declared as a practical matter; you were entitled to recover under the rule of law controlling your fact situation all during the litigation that has gone before; however, we are now changing the rule of law that is applicable to your fact situation and under this changed rule of law, you are not allowed to recover since you did not meet the requirements to recover when you had the opportunity in the Court's below even though those requirements were not required of you under the previous rule of law. Furthermore, we are not going to allow you the opportunity to present your claims under the requirements of this changed rule of law. Can it be denied that the Texas Supreme Court has denied Petitioner due process of law?

To have avoided this flagrant violation of the equal protection clause would have been such a simple matter. The Texas Court could have reversed and remanded the case with instructions for retrial under the changed rule of law that it announced. If this had been done who could be heard to complain? However, this was not done and as a practical effect of the Texas Court's judgment this Petitioner has been denied his guaranteed right to even be heard under the new rule of law now announced by the Texas Supreme Court. How can it be said that Petitioner has had his day in Court to present his claim when the controlling rule of law that

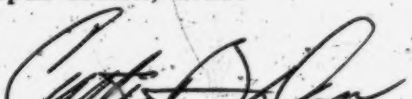
governs that fact situation from which Petitioner cannot escape was not even announced until long after those proceedings were history?

The fourth quarter of the ball game was completed and the score board clearly indicated that Petitioner Henry was victorious. Then after the final gun had sounded the officials declared a change in the rules of the game that eliminated Petitioner's total score and further declared that the opponent Delhi-Taylor was the victor under the changed rule.

For the reason that there exists a controlling decision which has now been presented to the Court and for the reasoning supporting the decision rendered by this Court, Petitioner implores this Honorable Court to reconsider his Petition for Writ of Certiorari and to grant the same.

Respectfully submitted,

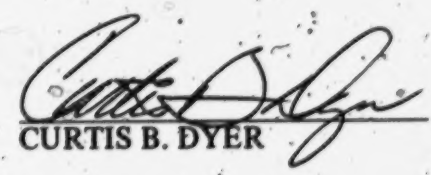
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By 
CURTIS B. DYER
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL AND SERVICE

Pursuant to Rule 58 of the Supreme Court Rules, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Paragraph 2 of Rule 58. A copy of the

foregoing brief, has been served on Mr. William H. Keys, Keys, Russell, Watson and Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorneys for Respondent.



CURTIS B. DYER



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